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## Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family

Kristin A. Collins

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## Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family

*Kristin A. Collins\**

INTRODUCTION: A TALE OF TWO WOMEN .....	1086
I. WIDOWS' MILITARY SUBSIDIES AND THE ORIGINS OF MARRIAGE-BASED ENTITLEMENTS .....	1095
A. <i>Recuperating Early Nineteenth-Century         Widows' Military Subsidies</i> .....	1097
B. <i>Marriage and Women's Welfare in the         Early Nineteenth Century</i> .....	1106
C. <i>Legislative Change, Legislative Resistance</i> .....	1110
II. CONSTRUCTING MARRIAGE IN EARLY ADMINISTRATIVE LAW .....	1116

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A.	<i>Courts, Private Contracting, and Public Marriages</i> .....	1118
B.	<i>Marriage Law Outside the Courts</i> .....	1122
1.	The Judgeless World of Military Subsidy Adjudication.....	1123
2.	Widows, Pension Clerks, and Proving Marriage.....	1130
3.	Widows, the President, and Congress.....	1140
C.	<i>Bureaucracy, Ideology, and Marriage Law</i> .....	1146
III.	INSTITUTIONAL PLURALISM.....	1151
A.	<i>Administering and Constituting Marriage Law</i> .....	1153
B.	<i>Pluralism in Nineteenth-Century Marriage Law</i> .....	1156
C.	<i>Administering Marriage in the Late Nineteenth and Early Twentieth Centuries</i> .....	1159
IV.	CONCLUSION: SOCIAL PROVISION, ADMINISTRATIVE LAW, AND THE MODERN FAMILY.....	1163

### INTRODUCTION: A TALE OF TWO WOMEN

In 1985, Gertrude Thomas sought Social Security survivors' benefits as Joseph Thomas's widow. Gertrude had been married to Joseph—or thought herself to have been—for forty-seven years. She bore and raised ten children over the course of their marriage. Gertrude knew Joseph had been married briefly before they wed, but she thought that his first marriage had ended in divorce. When the Department of Health and Human Services asked Gertrude for proof of her marriage to Joseph, she could not produce a marriage certificate or any other record of her marriage. She did have a statement signed by Joseph acknowledging their marriage. She also claimed that she and Joseph were “common law” spouses—that they agreed to be married and held themselves out as a married couple. But when Josie, the first wife, also applied for survivors' benefits as Joseph's widow, the agency found that Josie, not Gertrude, had been Joseph's wife for those many years, and it denied Gertrude's application.<sup>1</sup> In a 1990 Second Circuit opinion affirming the agency's determination, a

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1. See *Thomas v. Sullivan*, 922 F.2d 132, 134, 135, 138 (2d Cir. 1990).

concurring judge lamented that “[i]t seems unconscionable to me that this seventy-four year old widow who lived with Joseph Thomas for forty-seven years and bore ten of his children is now to be branded an adulteress.”<sup>2</sup>

In 1837, Thankful Reynolds of Waldo County, Maine, applied for a pension under a federal statute that provided for widows of Revolutionary War veterans.<sup>3</sup> Thankful was—or thought herself to be—the widow of Daniel Reynolds. Daniel had served in the Revolutionary War. He did not die in service. Rather, he died many decades later, in 1832, at seventy-two years of age. Thankful was seventy-eight when she applied for a pension under a federal statute enacted in 1836—one of over ninety public law statutes Congress enacted during the early nineteenth century creating and regulating cash and land subsidies for large classes of military widows.<sup>4</sup> Like the tens of thousands of other widows seeking such subsidies, Thankful was required to prove that Daniel had served in the military and that she was, in fact, his widow. Proof of Daniel’s service posed no problem for Thankful, but proving that she had been married to Daniel was another issue altogether. Thankful testified in a sworn, certified declaration that she was Daniel’s widow. Seven neighbors testified in sworn, certified declarations that Thankful and Daniel had lived together as husband and wife and had been generally reputed to be such. But the clerks working in the Pension Office in Washington, D.C., were underwhelmed by Thankful’s offers of proof. They wanted official record evidence of her marriage to Daniel. This demand asked the near impossible of Thankful, as she had married during a period when few municipalities had mandatory registration requirements. The Pension Office denied Thankful’s application.<sup>5</sup>

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2. *Id.* at 139 (Van Graafeiland, J., concurring).

3. File of Thankful Reynolds, Nat’l Archives & Records Administration, Washington, D.C., (“NARA”) Records of the Dep’t of Veterans’ Affairs, Record Group (“RG”) 15, W1118, *microformed on* RECORDS OF THE VETERANS’ ADMINISTRATION, REVOLUTIONARY WAR PENSION AND BOUNTY LAND APPLICATION FILES, 1800–1900 (1974), Series M804, Roll 2026. Many of the widows’ subsidy applications cited in this Article are available in microfilm Series M804. All citations to microfilmed applications include the unique index number assigned by the Pension Office (e.g., W1234 or R5678) and the microfilm roll number (e.g., Roll 1145). For additional information regarding the widows’ subsidy application files, see *infra* note 26.

4. Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127, 127–28 (creating pensions for widows of veterans of the Revolutionary War); see also sources cited *infra* notes 47–62 and accompanying text.

5. For facts regarding Thankful Reynolds’s pension application, date of marriage, husband’s service, and husband’s death, see File of Thankful Reynolds, W1118, Roll 2026, Decl. of Thankful Reynolds (Oct. 14, 1837). For evidence of Thankful Reynolds’s struggle with the Pension Office, see *id.*, Letter from Geo[rge] W. M[orton] to J.L. Edwards, Comm’r of Pensions (Feb. 13, 1838); *id.*, Letter from J.L. Edwards to Hon. Ruel Williams (Apr. 23, 1840). For

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A significant literature has emerged demonstrating how marriage is employed—for better or worse, successfully or unsuccessfully—as an antidote for women’s poverty and as a substitute for social provision.<sup>6</sup> These accounts describe how the liberal state promotes the private family as the primary and normatively appropriate site for the support of women as family dependents and leans on marriage as a cure for women’s poverty.<sup>7</sup> Reliance on the private family as a site of support for women is also claimed to shape the contours of the legally recognized family itself. Legal officials support marriage promotion policies and give official recognition to marriage-like relationships in order to bring women within the protective fold of a relationship that, once recognized in law, gives them a claim on a husband or would-be husband’s financial resources.<sup>8</sup> In so doing, such policies theoretically limit the need for government assistance by “privatizing” women’s dependency within the marital relationship.<sup>9</sup> While most accounts of this phenomenon focus on modern welfare policy, important historical investigations of

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neighbors’ testimony, see *id.*, Decl. of Bunker Carter (Oct. 2, 1837); *id.*, Decl. of Hannah Peck (Aug. 5, 1837); *id.*, Decl. of Olive Smith (Dec. 13, 1838); *id.*, Decl. of Stephen Bartlett (Mar. 28, 1840); *id.*, Decl. of Hezekiah Chase (Mar. 28, 1840); *id.*, Decl. of Daniel Whitmore (Mar. 28, 1840); *id.*, Decl. of Elisha Douglas (May 7, 1840). For more details concerning Thankful Reynolds’s pursuit of a pension, see *infra* notes 209–11 and accompanying text.

6. The term “social provision” simply refers to goods, services, or cash benefits provided by the government to individual citizens for their welfare. For a sample of literature arguing that the liberal state relies on the institution of marriage to insulate the polity from the costs associated with familial dependency, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* 106–18 (1995); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1267–70 (2001); Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 442–48 (2005); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2204–06 (1995); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1673–82 (2005); cf. Katherine Boo, *The Marriage Cure*, NEW YORKER, Aug. 18, 2003, at 105.

7. See, e.g., Onwuachi-Willig, *supra* note 6, at 1664 (discussing federal programs that “blindly promote marriage as a means of eliminating state financial responsibility for poor women and children”); Boo, *supra* note 6, at 105 (describing an Oklahoma program promoting marriage to single welfare mothers as a way to alleviate poverty).

8. See *infra* notes 301–03 and accompanying text.

9. In this context, “privatization” refers to the restriction of government provision for families and the concomitant maintenance of family dependents—those who do not participate in the market economy and hence are unable to support themselves—by private individuals, usually (but not always) a husband or father. See Cossman, *supra* note 6, at 416–18 (discussing the privatization of dependency in American family law and welfare policy).

the development of marriage law have traced this relationship between welfare policy and the legal form of the family to the early nineteenth century. At that time, judges employed a liberal approach to marriage recognition—through both generous evidentiary standards and recognition of informal, or “common law,” marriage—in part to secure marriage’s promises of financial support for women.<sup>10</sup>

Whether focusing on the experiences of women past or present, investigations of how marriage is legally constructed in relation to welfare policy tend not to contemplate the experiences of women like Gertrude Thomas and Thankful Reynolds—women who seek social provision on the basis of their marital status. Rather, such investigations tend to focus on the ways that marriage and marriage-like relationships are enlisted to effectively exclude women from need-based social provision by attaching them to a male provider.<sup>11</sup> But myriad forms of social provision use marriage as a basis for eligibility rather than as a basis for de facto exclusion, a point that is underscored today by the efforts of gay rights activists to secure various marriage-based entitlements for same-sex couples.<sup>12</sup> Indeed, a holistic view of centralized social provision in the United States reveals that, in many circumstances, a woman’s formal marital relationship with a man gives her a special claim on the polity for support.<sup>13</sup> Today, the number of women in the United States who

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10. Ariela Dubler has provided rich analyses of this phenomenon. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1656–59 (2003) [hereinafter Dubler, *Shadow*]; Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 967–74 (2000) [hereinafter Dubler, *Wifely Behavior*]; Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998) [hereinafter Dubler, *Governing*]; see also MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* 69–75 (1985) (describing the judicial creation of common law marriage in the early nineteenth century); Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, in U.S. HISTORY AS WOMEN’S HISTORY: NEW FEMINIST ESSAYS 107, 116 (Linda K. Kerber, Alice Kessler-Harris & Kathryn Kish Sklar eds., 1995) [hereinafter U.S. HISTORY AS WOMEN’S HISTORY] (describing nineteenth-century judicial opinions “which seemed to grant great latitude to individuals to contract marriage”).

11. See, e.g., Blumberg, *supra* note 6, at 1270 (observing that “the trend has been to privatize economic obligations, that is, to substitute property division and family support obligations for public social security[.] . . . ultimately pav[ing] the way for uniform inclusion of all cohabiting couples, whether formally married or not”); Cossman, *supra* note 6, at 465 (discussing welfare reform efforts through which “the federal government has . . . sought to reduce the rates of single motherhood by reducing out-of-wedlock births and promoting marriage”); see also sources *infra* notes 301–03 and accompanying text.

12. See *infra* text accompanying notes 307–09.

13. The most obvious modern example is the Social Security Act, which provides insurance benefits to the spouses, widows, and widowers of “insured individuals.” 42 U.S.C. § 402 (2006). Due to the requirements of modern equal protection doctrine, marriage now gives men a claim to social provision such as Social Security on the basis of their status as husbands or widowers. See

receive some sort of social provision based on their marital status (i.e., as wives or widows)<sup>14</sup> is several times that of the number of women who receive purely need-based assistance.<sup>15</sup> The relationship between welfare policy and the legal construction of marriage in such a context—where public marriage-based entitlements have been at stake—also has a history.<sup>16</sup> Using archival sources, this Article investigates the origins of public marriage-based entitlements and, more specifically, considers how the use of marriage as a basis for eligibility for social provision has shaped the legal metes and bounds of marriage itself.

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Califano v. Goldfarb, 430 U.S. 199, 204 (1977) (invalidating the Social Security Act's requirement that widowers but not widows prove dependency in order to receive spousal survivor benefits). Nevertheless, it is appropriate to discuss modern marriage-based entitlements in terms of women's claims on the polity because such entitlements continue to function in a gender-salient manner. Today, only two percent of individuals receiving Social Security as spouses are men. See *Social Security Benefits for Economically Vulnerable Beneficiaries: Hearing Before the Subcomm. on Social Security of the H. Ways and Means Comm.*, 110th Cong. (2008) (statement of Joan Entmacher, Vice President and Director of Family Economic Security, National Women's Law Center). For a discussion of Social Security as a form of social provision, see *infra* note 298 and accompanying text.

14. Throughout this Article, I use the term "marital status" to include what might seem to be more accurately described as "former marital status" or "widowhood." I do so for two reasons. First, generally speaking, the phrase "marital status" refers not only to whether one is currently married or unmarried, but instead distinguishes between the ever-married and the never-married. Hence, "marital status" also typically encompasses the categories "divorced" and "widowed." Second, I do not use the term "widowhood" in place of "marital status" because that phrase took on special meaning in the context of early nineteenth-century widows' military subsidies: Women were required to prove *both* the legitimacy of their marriages to their deceased husbands and their continuing widowhood. See *infra* note 57 and accompanying text.

15. Compare U.S. SOC. SEC. ADMIN., OFFICE OF POLICY, OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE, ANNUAL STATISTICAL SUPPLEMENT tbl.5.A7 (2007), <http://www.ssa.gov/policy/docs/statcomps/supplement/2007/5a.html#table5.a7> (finding that approximately seven million women received Social Security benefits as widows or wives in 2006), with U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS tbl.20 (2005), <http://www.acf.hhs.gov/programs/ofa/character/FY2005/tab20.htm> (finding that approximately one million women received TANF benefits in 2004–2005).

16. Legal historians have provided searching analyses of the private law doctrines that developed to provide for a married woman both during marriage and at her husband's death, see, e.g., sources cited *supra* note 10, and historians of social policy have attended to the development of programmatic provision for women in the early twentieth century. See generally MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 181–213 (1996); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935, at 37–64 (1994); SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 427–524 (1992); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid*, in WOMEN, THE STATE, AND WELFARE 123, 138 (Linda Gordon ed., 1990). However, it appears that little sustained attention has been given to the earliest origins of centralized public marriage-based entitlements per se and the relationship of those entitlements to the legal definition of marriage.

Marriage-based entitlements are generally thought of as a fairly modern phenomenon—a product of the development of America's peculiar and relatively limited welfare state in the early twentieth century. Traditional accounts of the origins of social provision in the United States identify the 1939 Social Security Act,<sup>17</sup> or perhaps the Mothers' Aid statutes of the Progressive Era,<sup>18</sup> as the earliest forms of social provision specifically intended for women.<sup>19</sup> Following Theda Skocpol's seminal work on the Civil War pension system, some might contend that cash assistance for Civil War widows was the first systematic social provision for women.<sup>20</sup> My first task, undertaken in Part I, is to reconsider these chronological accounts, with specific attention to the central role of marriage law in the development of social provision for women in the United States. I do so by providing the first thorough analysis of a significant early nineteenth-century system of cash and land subsidies for the widows of men who participated in all manner of military endeavors on behalf of the United States, from the Revolutionary War through the Mexican-American War.<sup>21</sup> Surprisingly, these federal widows' military subsidies—the first broad-scale marriage-based entitlements in American law and policy—have gone virtually unacknowledged in the history of welfare policy and the legal construction of the family, notwithstanding their importance as a source of financial support for tens of thousands of women in the early nineteenth century.<sup>22</sup>

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17. Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. For a wonderfully rich examination of the deliberations leading to the enactment of the 1939 Act, see Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN'S HISTORY, *supra* note 10, at 87.

18. Mothers' Aid—cash assistance for poor mothers—emerged in a flurry of state legislation during the first two decades of the twentieth century. In most states Mothers' Aid statutes tended to benefit widows and deserted wives with children, rather than never-married mothers. See ABRAMOVITZ, *supra* note 16, at 201 (noting that “eligibility rules distinguished among women according to their marital status and denied aid to other husbandless women viewed as departing from prescribed wife and mother roles”).

19. See sources cited *supra* note 16.

20. See SKOCPOL, *supra* note 16, at 132.

21. See *infra* Part I.A.

22. Without particular attention to their historical significance as marriage-based entitlements, I analyze the pre-Civil War widows' military pensions as an example of early federal family law policy in *Federalism's Fallacy: Early Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1784–1808 (2005). Linda Kerber examines women's Revolutionary era petitions for private relief in WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 93–94 (1980), but does not examine the public law statutes that were enacted throughout the pre-Civil War period, which are the focus of this Article. Both Laura Jensen and John Resch provide important analyses of early nineteenth-century *veterans'* military subsidies, but neither gives significant attention to *widows'* subsidies. See LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY (2003); JOHN RESCH, SUFFERING SOLDIERS: REVOLUTIONARY WAR VETERANS, MORAL SENTIMENT, AND



The story of early nineteenth-century widows' military subsidies not only gives new challenge to lingering claims of laissez-faire liberalism's particular hold on the nineteenth century,<sup>23</sup> it also provides a fresh perspective on the socio-legal evolution of marriage. As the first broad-scale system of public marriage-based entitlements, widows' military subsidies marked an important development in marriage's legal significance, both for women and for the state. Although marriage had traditionally functioned to secure certain forms of material support for women through various *private* law liabilities—such as the husband's obligation to support his wife and children and the widow's right to dower<sup>24</sup>—widows' military subsidies used marriage as a basis for broad-scale *public* law liability for women's support.<sup>25</sup> In so doing, women's military subsidies gave the

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POLITICAL CULTURE IN THE EARLY REPUBLIC (1999); John Resch, *Federal Welfare for Revolutionary War Veterans*, 56 SOC. SERV. REV. 173 (1982). Lori Beth Finklestein's unpublished Ph.D. dissertation, *Matrons of the Nation: Old Women, Younger Men, and the Pursuit of Revolutionary War Pensions for Widows in Nineteenth-Century America* (N.Y.U. History Department, 2003), analyzes Revolutionary War widows' pension applications for evidence of intergenerational relationships between elderly widows and their younger male pension agents but does not focus on the pensions' significance as social provision or as marriage-based entitlements. In contrast, there is a significant literature concerning Civil War widows' pensions. See, e.g., ELIZABETH REGOSIN, FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION (2002); SKOCPOL, *supra* note 16, at 129, 132, 139; Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999); Amy E. Holmes, "Such Is the Price We Pay": American Widows and the Civil War Pension System, in TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR 171 (Maris A. Vinovskis ed., 1990); Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. AM. HIST. 456 (1996); Beverly Schwartzberg, "Lots of Them Did That": Desertion, Bigamy, and Marital Fluidity in Late-Nineteenth-Century America, 37 J. SOC. HIST. 573 (2004).

23. Such claims are, indeed, only lingering in light of the contributions of historians who have reconstructed various aspects of antebellum regulation. See, e.g., WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (analyzing the regulation of health, safety, morality, and welfare in the nineteenth century); Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835*, 11 STUD. AM. POL. DEV. 347, 368-73 (1997) (describing the new "institutionalist" accounts of the early republic's government, its polity, and political developments); sources cited *infra* note 125.

24. See *infra* Part I.B.

25. Throughout this Article, I use the term "private law" to refer to those laws that created or allocated liabilities and legal duties among and between individuals, and "public law" to refer to those laws that created legal liabilities or duties between the individual and the state. See Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 849 (2006) (noting that in certain contexts, "private law" is used to describe relations between private parties, while "public law" describes "relations that include the state in its role of sovereign"). I do so not because those are the only or even best understandings of those terms generally, but because they are the understandings that best convey the shift in the legal implication of marriage that I seek to describe in this Article. By asserting that widows' military subsidies created a new form of public law liability, I do not suggest that marriage was not already a public legal status in many respects, only that those respects did not generally include the creation of a legal claim against the state for material

polity a different financial stake in the regulation of marriage: whereas before, marriage had largely worked to insulate the polity from women's claims of financial need, with the creation of marriage-based entitlements, marriage could also serve as a doorway to public support.

My second task is to consider how this development—the creation of a significant redistributive system that tied eligibility for social provision to marital status—helped to shape the legal construction of marriage itself, a project I undertake in Part II. Through the careful examination of over 300 randomly selected handwritten widows' military subsidy applications, I explore an unexamined world of early nineteenth-century family law adjudication.<sup>26</sup> Accounts of regulation of the marital family in the early nineteenth century have focused on the judicial construction of marriage.<sup>27</sup> Empowered by their offices and the common law method, judges developed a broad legal definition of marriage during the period, thereby reaffirming the private family, rather than the state, as the proper source of financial support for women—privatizing women's dependency, in modern parlance.<sup>28</sup>

But the tens of thousands of women who sought military subsidies were required to prove their marital status and their ongoing widowhood not in the courts, but through a surprisingly formalized federal administrative process—a point that is itself notable in an era reputed for its anemic administrative apparatus.<sup>29</sup> Unlike judges, the low-level pension clerks charged with the review of military subsidy applications showed extreme skepticism of women's claims of marital status, even when those claims were based on assertions of fact that would have satisfied a judicial definition of marriage.<sup>30</sup> Saddled with the responsibility of allocating government

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support based on marital status. For a rich, historically based description of the public dimensions of marriage, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000).

26. My study of widows' subsidy applications has entailed review of over 300 randomly selected handwritten military subsidy applications from the pre-Civil War period, out of over 50,000 applications filed by widows during that period. See *infra* note 63. Individual applications range in length from about twenty to seventy pages. All extant widows' military subsidy applications from that period are housed in the National Archives in Washington, D.C., as part of the Records of the Department of Veterans' Administration, Record Group ("RG") 15. All transcriptions are my own, as are any transcription errors.

27. See *infra* Part II.A.

28. See Dubler, *Wifely Behavior*, *supra* note 10, at 969 ("The doctrine of common law marriage provided judges with a way to privatize the financial dependency of economically unstable plaintiffs.").

29. See *infra* Part II.B.1; see also *infra* note 125.

30. See *infra* Part II.B.2.

assets and protecting those assets from unfounded and fraudulent claims, pension clerks ruthlessly questioned women's assertions of marital status, developing a bureaucratized definition of marriage. In so doing, these administrators introduced a restrictive, state-centered construction of marriage during a period otherwise known for its generous, community-based definition of legal marriage. But despite the divergence in their legal conceptions of marriage, judges' and administrators' disparate definitions were fiscally and ideologically consistent: in their respective contexts, both limited the state's responsibility for women's financial needs.

My goal in examining the operation of marriage law in early nineteenth-century administrative adjudication is not to challenge the general account of the evolution of the legal regulation of marriage in nineteenth-century courts. Rather, it is to expand our understanding of "the law" of marriage by shifting the institutional frame through which we assess the legal history of family law to include administrative law and process. The sources I examine show how family law, like other areas of law, had a life outside the courts—one that was subject to various ideological, institutional, and fiscal pressures.<sup>31</sup> As I discuss in Part III, once we broaden our field of analysis to include administrative law and processes, we begin to see how divergent liability regimes, implemented by different legal officials, led to pluralism in early nineteenth-century marriage law: multiple definitions of marriage employed by legal actors operating in different institutional contexts. This was not pluralism with a liberatory potential. Rather, it was a pluralism that enabled the state to control marriage as a legal status and, with sensitivity to different redistributive incentive structures, protect the polity from women's dependency.

Legal history is important for what it tells us about the past, and because it provides critical perspective on the present. Hence, I

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31. In recent years, the phrase "law outside the courts" has been employed frequently in reference to constitutional law, specifically to describe the view that the socio-legal meaning of the Constitution is not formed entirely or even primarily through judicial interpretation. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). But the notion that law more generally is shaped and constituted by the actions and interpretive efforts of both official and unofficial actors operating in various legal and nonlegal contexts has a robust tradition—a tradition that is closely identified with the law and society movement. See, e.g., Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 50 (Austin Sarat & Thomas R. Kearns eds., 1993) (explaining that "[c]onstitutive theories of law reject the instrumentalist picture of law as external to social practices and as displaceable by systems of norms and relations that exist beyond the reach of law"); see also *infra* Part III.B.

conclude in Part IV by considering how the study of early nineteenth-century widows' military subsidies illuminates modern debates concerning the nature of marriage as a legal institution, the interaction between marriage law and social provision, and the relationship between women and the state. It is undoubtedly true that today, marriage and legally recognized familial relationships function as tools for containing women's dependency within the private family.<sup>32</sup> But even (or especially) in the United States—with its relatively limited and conditional system of social safety nets—marriage also serves to make certain forms of family dependency a basis for social provision.<sup>33</sup> And today, as in the past, when marriage functions as a conduit for social provision, the state tends to emphasize marriage's role as an instrument of social and legal closure. This point is demonstrated by the rather elaborate qualifications of the term "spouse" in the Social Security Act and is dramatically illustrated by the Defense of Marriage Act's effective exclusion of same-sex couples from federal benefits.<sup>34</sup> Accordingly, just as we should be attentive to how the state employs an expansive vision of the legally recognized family to limit public liability for women's financial needs, we should also be sensitive to how the state reinforces marriage's exclusionary dimensions when allocating social provision.

In the hands of different legal officials, operating in different institutional contexts, the legal family transforms in response to pressures of various kinds—ideological, moral, institutional, and fiscal. The story of widows' military subsidies, and their adjudication, thus undermines persistent claims today of marriage's enduring and transhistorically stable form—claims that are used to justify continued exclusion of various groups from marriage's many entitlements.

#### I. WIDOWS' MILITARY SUBSIDIES AND THE ORIGINS OF MARRIAGE-BASED ENTITLEMENTS

Thankful Reynolds's pursuit of a widows' pension was a common enough experience in the early nineteenth century, but one that is not easily situated within the conventional understanding that

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32. See sources cited *supra* note 6 and *infra* notes 301–03.

33. See Madonna Harrington Meyer, *Making Claims as Workers or Wives: The Distribution of Social Security Benefits*, 61 AM. SOC. REV. 449, 451 (1996) (noting that the Social Security system "has a dual eligibility structure that permits older people to receive social security benefits as retired workers or as spouses or widows of retired workers").

34. See *infra* Part IV.

government assistance during the period was by and large limited to local poor relief and almshouses.<sup>35</sup> Reynolds's story, and the stories of the tens of thousands of other women who applied for widows' military subsidies in the early nineteenth century, have received little attention despite interest in the history of welfare policy, and in public and private law responses to the "feminization of poverty."<sup>36</sup> In this Part, I provide the first thorough accounting of these unfamiliar artifacts—the public laws enacted by Congress to provide for military widows—and argue that the military subsidy system that developed for widows in the early nineteenth century should be understood as an innovative form of social provision that has now become a commonplace fixture in American social policy: the marriage-based entitlement. The very existence of these entitlements challenges the chronological account that places the origins of centralized social provision for women in the early twentieth century. And, the focus of my inquiry here, accounting for these early nineteenth-century marriage-based entitlements reveals the central function of marriage law in the development of social provision and, at the same time, evidences an important expansion of the socio-legal significance of marriage.

First, I describe the statutory evolution of pre-Civil War military subsidies for widows, demonstrating how they grew from a very limited subsidy for officers' war widows into a government entitlement available to a substantial cross-section of women. Next, I examine how the evolution of widows' military subsidies altered the legal significance of marriage itself. Specifically, I argue that these subsidies signified an important development in the redistributive effect of marriage: while marriage had mostly affected private liabilities (i.e., the transfer of private property and the creation of private law liabilities), now it could also result in a statutory public law claim on the federal coffers. Finally, drawing on the legislative history of widows' military subsidies, I show how widows' subsidy legislation functioned as a site of contest concerning the propriety of using marital status as a basis for redistributing public assets.

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35. See ABRAMOVITZ, *supra* note 16, at 75–100, 137–71 (describing the development and reform of the poor laws in colonial and early nineteenth-century America); WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 47–71 (6th ed. 1999) (examining the spread of poor laws in the post-revolutionary period).

36. See sources cited *supra* notes 10, 16.

*A. Recuperating Early Nineteenth-Century Widows' Military Subsidies*

Over the course of the early nineteenth century, a public law military subsidy system blossomed, such that during the mid-1830s, the federal government regularly dedicated between ten and twenty percent of its total budget to military pensions.<sup>37</sup> During the pre-Civil War period, the federal government also allocated nearly fifty million acres of public lands for military land bounties.<sup>38</sup> The subsidies Congress granted to veterans and widows during this period were of a new scope and dimension, leading one early twentieth-century historian of the system to remark that “[i]n its grants for the reward and relief of soldiers the United States pension system has become more generous—even lavish—than that of any other nation in the history of the world.”<sup>39</sup>

Recent scholarship has shed light on how this “lavish” system provided for an ever-expanding class of veterans in the early nineteenth century.<sup>40</sup> But much of this system concerned the administration not of veterans’ claims to pensions and bounty lands, but of widows’ military subsidies. It is estimated that pensions paid to widows accounted for about a quarter of the approximately \$90 million paid out under Revolutionary War pension statutes alone<sup>41</sup>—a tally that excludes pensions granted to the widows of men who served in other military encounters, such as the War of 1812, frontier battles, assorted naval encounters, and the Mexican-American War. An 1854 guide to the military subsidy system, Robert Mayo and Ferdinand Moulton’s *Army and Navy Pension Laws and Bounty Land Law of the United States*, observed that widows and orphans constituted the most numerous class of pensioners under the military pension system then

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37. See JENSEN, *supra* note 22, at 118 fig.3.9 (showing the percentage of veterans’ pensions out of total federal expenditures from 1792 to 1838).

38. JAMES W. OBERLY, *SIXTY MILLION ACRES: AMERICAN VETERANS AND THE PUBLIC LANDS BEFORE THE CIVIL WAR* 114 (1990) (showing that between 1847 and 1861, the Pension Office issued bounty land warrants to veterans and widows for approximately 49,756,000 acres).

39. WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* 2 (1918) [hereinafter GLASSON, *FEDERAL MILITARY PENSIONS*]; see also WILLIAM HENRY GLASSON, *HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES* 127 (1900) [hereinafter GLASSON, *HISTORY*].

40. See JENSEN, *supra* note 22, at 88–109 (describing the expansion of Revolutionary War veterans’ pensions in the early nineteenth century); RESCH, *supra* note 22, ch. 4 (discussing the political controversy and cultural changes leading to the enactment of the 1818 pension act for Revolutionary War veterans); see also GLASSON, *HISTORY*, *supra* note 39, at 33–36 (noting that the 1818 Pension Act dramatically expanded Revolutionary War veterans’ pensions).

41. See GLASSON, *HISTORY*, *supra* note 39, at 52.

in effect.<sup>42</sup> It should come as no surprise, then, that Francis Triplett, a retired Chief Clerk of the Pension Office, dedicated a substantial portion of his volume *An Analytical Digest of the Pension and Bounty Land Laws* to the interpretation and administration of widows' subsidies.<sup>43</sup>

One might assume that in the early nineteenth century public support for military widows was an expected state function, given a long tradition of compensation for "war widows."<sup>44</sup> But the system of federal widows' military subsidies that developed in America over the course of the early nineteenth century differed significantly from eighteenth-century English and colonial practices in both scope and kind. First, Congress gradually but substantially expanded the demographic reach of the subsidy system as it applied to traditional war widows—those women whose husbands died in the line of duty. In eighteenth-century England, systematic provision for the widows of officers was routine, but provision for the widows of soldiers was far less common.<sup>45</sup> In keeping with this tradition of status-based social

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42. See ROBERT MAYO & FERDINAND MOULTON, *ARMY AND NAVY PENSION LAWS, AND BOUNTY LAND LAWS OF THE UNITED STATES*, at xxiv (2d ed., Balt., Lucas Brothers 1854).

43. See F.C.C. TRIPLETT, *AN ANALYTICAL DIGEST OF THE PENSION AND BOUNTY LAND LAWS*, 29–44, 45–47, 107–21, 141–51, 223–27 (Wash., D.C., 1854).

44. See, e.g., GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 39, at 16–17 (describing colonial-era military pensions for "maimed" veterans and the families of soldiers "slain" in battle).

45. For example, in England, by the eighteenth century pensions for officers' war widows were routinely available, but such pensions were not made available to the war widows of soldiers until the end of the nineteenth century. See MYNA TRUSTAM, *WOMEN OF THE REGIMENT: MARRIAGE AND THE VICTORIAN ARMY* 92 (1984) ("Pensions for widows of officers originated in the early eighteenth century. NCOs and privates had to wait for almost two centuries before the needs of their families were recognized."); see also DUDLEY POPE, *LIFE IN NELSON'S NAVY* 89 (1996) (noting that "[p]ensions were paid to . . . officers [in the eighteenth-century British navy] and, in certain cases, to their widows"). Historians have uncovered two exceptions to this trend, exceptions that may prove the general rule. Geoffrey Hudson provides a rich account of the pensions awarded to the widows of common soldiers who died fighting the Royalists in the English Civil War in the mid-seventeenth century. For a relatively brief period, soldiers' war widows were eligible to receive pensions from a fund established by the short-lived republican Commonwealth government, so long as the widow could demonstrate poverty due to her husband's death. See Geoffrey L. Hudson, *Negotiating for Blood Money: War Widows and the Courts in Seventeenth-Century England*, in *WOMEN, CRIME AND THE COURTS IN EARLY MODERN ENGLAND* 146, 151–52 (Jennifer Kermode & Garthine Walker eds., 1994). Hudson explains, however, that after the demise of that system with the Restoration of the monarchy, widows of English soldiers would not receive pensions "for over 200 years." *Id.* at 146. Isser Woloch has excavated another republican experiment with soldiers' widows' pensions, in France at the end of the eighteenth century. France's experiment with *pension alimentaire* for soldiers' widows was also short-lived, ending in the 1810s. See Isser Woloch, *War-Widows Pensions: Social Policy in Revolutionary and Napoleonic France*, 6 *SOCIETAS* 235, 238–40 (1976) (discussing military pensions provided in 1790 to widows whose husbands died in the line of duty, and the development of war widows' pensions through the Napoleonic Wars). Notably, Woloch describes

provision for war widows, colonial governments tended to provide significant pensions to widows of officers as a matter of course, but they tended to provide for widows of soldiers, if at all, through poor-law type statutes that were based on need and limited to subsistence-level support.<sup>46</sup>

This status-based trend continued in the late eighteenth and early nineteenth centuries, when both the Continental Congress and later Congress enacted statutes providing pensions for widows of officers only. For example, with respect to Revolutionary War widows, the Continental Congress awarded seven-year half-pay pensions to the widows of officers, but nothing to the widows of soldiers.<sup>47</sup> In the

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the war widows' pensions made available to traditional war widows as "a welfare measure rather than a form of earned recompense." *Id.* at 238.

46. For examples of revolutionary-era colonial and state poor law provision for families of soldiers, see An Act for the Ordering & Regulating of the Militia of this Province & for the Better Security and Defence Thereof (1678), 7 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, OCT. 1678–NOV. 1683, at 58 (William Hand Browne ed., Balt., 1889); An Act for Relieving Such as Shall be Maimed in the Colonies Service, and the Widow, Parents or Relations of Such as Shall be Kill'd in the Colonies Service, and Shall not Be Able to Subsist or Maintain Themselves (1718), *reprinted in* THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647–1719, at 228–29 (John D. Cushing ed., 1977); An Act for Speedily Recruiting the Virginia Regiments on Continental Establishment (1778), ch. 45, 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 588, 589 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) [hereinafter 9 LAWS OF VA.]; An Act for Raising a Body of Volunteers for the Defence of the Commonwealth (1779), ch. 4, 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 18, 21 (William Waller Hening ed., Richmond, George Cochran 1822) [hereinafter 10 LAWS OF VA.]; An Act for Speedily Recruiting the Quota of this State for the Continental Army (1779), ch. 12, 10 LAWS OF VA. 257, 262; An Act to Amend the Act Concerning Pensioners (1785), ch. 44, 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 102, 105 (William Waller Hening ed., Richmond, George Cochran 1823) [hereinafter 12 LAWS OF VA.]. For examples of revolutionary-era statutes providing pensions for the widows of officers, see An Act for Making Good the Future Pay of the Army, and for Other Purposes (1780), ch. 27, 10 LAWS OF VA., *supra*, at 373, 374; An Act Concerning the Claims to Full Pay of Certain Officers, and to Half Pay of the Widows and Orphans of Officers that Died in the Service (1786), ch. 22, 12 LAWS OF VA., *supra*, at 279; An Act for the More Effectual Supply and Honourable Reward of Pennsylvania Troops, in the Service of the United States of America, ch. 880, LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 831, 833 (Alexander James Dallas ed., Phila., 1797). In 1778, Virginia enacted a statute promising half-pay pensions to war widows of officers and soldiers. See Act of Oct. 3, 1778, ch. 30, 9 LAWS OF VA., *supra*, at 565, 566. ("[T]he widow of every such officer and soldier [who is killed in war] shall, during her natural life, be entitled to and receive half the pay that her husband was entitled to when in the service."). However, given that subsequent pension laws enacted by Virginia provided for the widows of soldiers only upon demonstration of poverty, it is unclear how many soldiers' widows benefited from this unusual entitlement statute. Moreover, as I have explained elsewhere, the states were notoriously remiss in actually paying war widows' (and invalid soldiers') pensions, and the failure of the states and the federal government to provide for the Revolutionary War widows of soldiers is evident in contemporary appeals to Congress. Collins, *supra* note 22, at 1788–89; see also KERBER, *supra* note 22, at 92–93 (describing how war widows, having received no help from the federal government, turned to state legislatures, which were "troubled by war debts" and "hesitated to embark on a general commitment").

47. See 17 J. CONT. CONG. (1774–1789) 415, 772–73 (1780).



1790s, when Congress first began enacting military subsidy statutes for the widows of sundry early nineteenth-century military encounters, it did little to depart from this status-based approach. In several significant acts concerning the establishment of a military, Congress continued the practice of awarding pensions to officers' war widows only.<sup>48</sup>

Two years into the War of 1812, Congress began leveling traditional war widows' pensions, but it was a slow and piecemeal process.<sup>49</sup> As Mayo and Moulton observed in their comprehensive, 900-page tome on pension and land bounty laws, widows' pensions were "gradually extended . . . until at length the principle of *equal right*

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48. For examples of acts granting pensions to officers' war widows only, see Act of Mar. 3, 1815, ch. 79, § 7, 3 Stat. 224, 225 (extending widows' pensions authorized by the Act of Mar. 16, 1802 to widows of officers enlisted pursuant to this statute); Act of Aug. 2, 1813, ch. 40, § 1, 3 Stat. 73, 73–74 (providing five-year half-pay pensions to the widows of "commissioned officer[s] of the militia, or of any volunteer corps" killed while in "actual service of the United States"); Act of Jan. 29, 1813, ch. 16, § 11, 2 Stat. 794, 795–96 (providing five-year half-pay pensions to widows of commissioned officers enlisted pursuant to this statute who "die, by reason of any wound received in actual service of the United States"); Act of Jan. 20, 1813, ch. 10, 2 Stat. 790, 790–91 (providing five-year half-pay pensions to widows of "officer[s] of the navy or marines [who] shall be killed or die, by reason of a wound received in the line of his duty"); Act of Jan. 11, 1812, ch. 14, § 15, 2 Stat. 671, 673 (providing five-year half-pay pensions to widows of "any commissioned officer in the military establishment of the United States" who died "by reason of any wound received in actual service of the United States"); Act of Jan. 2, 1812, ch. 11, § 4, 2 Stat. 670, 670 (extending widows' pensions authorized by the Act of Mar. 16, 1802 to widows of officers enlisted pursuant to this statute); Act of Apr. 12, 1808, ch. 43, § 5, 2 Stat. 481, 483 (extending widows' pensions authorized by the Act of Mar. 16, 1802 to widows of officers enlisted pursuant to this statute); Act of Mar. 16, 1802, ch. 9, § 15, 2 Stat. 132, 135 (providing five-year half-pay pensions to the widows of commissioned officers of the United States who "die by reason of any wound received in actual service of the United States"); Act of Mar. 14, 1798, ch. 15, 1 Stat. 540, 540 (extending widows' pensions authorized by the Act of June 7, 1794 to the widows of "commissioned officers of the troops of the United States, and of the militia" who "died by reason of wounds received" in the line of duty after 1789); Act of June 7, 1794, ch. 52, § 1, 1 Stat. 390, 390 (providing five-year half-pay pensions to widows of commissioned officers who "die by reason of wounds received in actual service of the United States"). There were occasional departures from this trend. In 1802, two years after the naval vessels *Insurgent* and *Pickering* were lost in a storm during the undeclared war with France, Congress authorized a small one-time payment to the widows and orphans of "officers, seamen and marines" who died on board, thus reaching the widows of men of all ranks, not just those of officers. Act of Apr. 29, 1802, ch. 33, 2 Stat. 170, 170. Also, in 1812, widows of "officers . . . , non-commissioned officers, and soldiers, of the volunteers or militia" killed "in the late campaign on the Wabash against the hostile Indians" were awarded five-year half-pay pensions. Act of Apr. 10, 1812, ch. 54, § 2, 2 Stat. 704, 704. An 1836 report of the House Committee of Claims confirms that the Act of April 10, 1812 was "the first act that granted half pay to the widows and orphans of non-commissioned officers and soldiers, being volunteer or militia," adding that the act was "retrospective in its operations." COMM. ON CLAIMS, MAJOR DADE, ET AL.—PENSIONS TO WIDOWS AND CHILDREN, H.R. REP. NO. 34-415, at 3 (1st Sess. 1836).

49. The legislative debates concerning subsidies for widows of soldiers evidence a pronounced concern for family equality. See Collins, *supra* note 22, at 1795–1803; see also Kristin A. Collins, "Petitions Without Number," 29–37 (May 14, 2009) (unpublished manuscript, on file with the Vanderbilt Law Review).

embraced the widows and orphans of officers and soldiers.”<sup>50</sup> In March 1814, Congress granted pensions to widows of any seamen or marines—the Navy equivalent of enlisted soldiers—who “shall die” or “shall have died” in the War of 1812 “by reason of a wound received in the line of duty.”<sup>51</sup> In April 1816, Congress retrospectively granted pensions to widows of soldiers of the regular army and militia who died “in service of the United States” during the War of 1812.<sup>52</sup> In subsequent decades, Congress episodically (but consistently) provided pensions to widows of soldiers of ongoing naval encounters, military efforts to settle the frontier, and the Mexican-American War.<sup>53</sup> By the

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50. MAYO & MOULTON, *supra* note 42, at xxvii. Military subsidies for soldiers and veterans followed a similar trajectory. Although invalid pensions were made available to disabled soldiers early on, service-based pensions were initially awarded to Revolutionary War officers only. Congress gradually equalized service-based military pensions for Revolutionary War veterans by expanding the classes of servicemen who were eligible. See generally GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 39, at 64–97 (describing the enactment of service-pension statutes for the rank-and-file during the early nineteenth century); JENSEN, *supra* note 22, at 88–109 (describing the petitioning and lobbying efforts of veterans, which contributed to Congress’s decision to broaden the veterans’ pension program); RESCH, *supra* note 22, ch. 4 (detailing the legislative and political history of the 1818 Pension Act, which provided a means-tested service-based pension to Revolutionary War veterans of all ranks).

51. Act of Mar. 4, 1814, ch. 20, § 1, 3 Stat. 103, 103.

52. Act of Apr. 16, 1816, ch. 55, §§ 1–2, 3 Stat. 285, 285–86.

53. See, e.g., Act of Mar. 3, 1817, ch. 60, § 1, 3 Stat. 373, 373–74 (providing five-year half-pay pensions to the widows of Navy officers, seamen, and marines who died or die in the line of duty after June 18, 1812); Act of Apr. 16, 1818, ch. 65, § 1, 3 Stat. 427, 427–78 (granting five-year extension of pensions awarded to widows pursuant to the Act of Mar. 4, 1814); Act of Apr. 20, 1818, ch. 101, 3 Stat. 459 (granting five-year half-pay pension to widows of militia who “prosecut[ed] the war against the Seminole tribe of Indians”); Act of Mar. 3, 1819, ch. 60, 3 Stat. 502 (granting five-year extension of pensions awarded to widows of all “officers, seamen, and marines” killed in the War of 1812); Act of Jan. 22, 1824, ch. 15, § 1, 4 Stat. 4, 4 (granting five-year extension of pensions awarded to widows of all “officers, seamen, and marines” killed in the War of 1812); Act of Apr. 9, 1824, ch. 34, 4 Stat. 18, 18 (granting five-year extension of pensions awarded to widows of “persons slain in the public or private armed vessels of the United States”); Act of May 23, 1828, ch. 72, 4 Stat. 288, 288 (granting five-year extension of pensions awarded to widows of all “officers, seamen and marines” killed in the War of 1812); Act of June 28, 1832, ch. 151, 4 Stat. 550 (granting five-year extension of pensions awarded to widows of all “officers, seamen, and marines, who were killed in battle” in the War of 1812); Act of June 19, 1834, ch. 55, 4 Stat. 679 (granting five-year extension of pensions awarded to widows pursuant to the Acts of Mar. 4, 1814 and Apr. 16, 1818); Act of June 30, 1834, ch. 134, § 1, 4 Stat. 714, 714 (granting five-year half-pay pension to widows of all “officers, seamen, and marines” who “died in the naval service” after Jan. 1, 1824); Act of Mar. 19, 1836, ch. 44, §§ 1, 5, 5 Stat. 7, 7 (granting five-year half-pay pensions to the widow of any “officer, non-commissioned officer, artificer or private,” of volunteer and militia corps, “who shall die in the service of the United States”); Act of July 4, 1836, ch. 362, § 1, 5 Stat. 127, 127–28 (granting five-year half-pay pensions to widows of officers, non-commissioned officers, musicians, and privates of the militia who died in the service of the United States after 1818); Act of Mar. 3, 1837, ch. 38, § 1, 5 Stat. 180, 180 (providing a life-time pension to the widow of any “officer, seaman, or marine [who] have died, or may hereafter die, in the naval service”); Act of Mar. 3, 1845, ch. 41, 5 Stat. 731, 731 (granting five-year extension of pensions awarded to widows of “officers, seamen, and marines” who died in the line of duty); Act of Mar. 3, 1847, ch. 49, § 2, 9 Stat. 174, 174 (granting five-year extension “to all pensions of similar kind” to those extended by the Act of Mar. 3, 1845); Act of July 21, 1848, ch. 108, §§ 1–2,

1830s, it had become fairly standard practice for the national government to award pensions or land bounties to the traditional war widows of the rank-and-file.<sup>54</sup>

As significant as it was for Congress to extend pensions to the war widows of soldiers, perhaps even more notable was Congress's retrospective award of *service-based* pensions to the widows of Revolutionary War veterans (of all ranks). These women, like Thankful Reynolds, were not traditional war widows—the young widows of fallen soldiers. Rather, they were the elderly surviving widows of men who, like Daniel Reynolds, had served in the Revolutionary War and died of unrelated causes decades after the war ended. The Act of July 4, 1836 created the first service-based pension for the widows of veterans, granting lifetime pensions to widows of “any person” who had served in the Revolutionary War for at least six months; whose husbands had died any time prior to 1836; who had been married to the soldier during the war (and who therefore presumably had suffered the hardships of war); and who had never remarried.<sup>55</sup>

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9 Stat. 249, 249–50 (granting five-year half-pay pensions to widows of “officers, non-commissioned officers, musicians, and soldiers” of the United States army who served at any time in the Mexican-American War); Act of Aug. 11, 1848, ch. 155, §§ 1–2, 9 Stat. 282, 282–83 (granting five-year extension of pensions awarded to widows “under any of the laws of Congress” enacted after 1841 and extending widows' half-pay pensions to Navy engineers, firemen, and coal-heavers); Act of Feb. 3, 1853, ch. 41, § 1, 10 Stat. 154, 154 (granting five-year extension of pensions awarded to widows of numerous military encounters, including “various Indian wars”).

54. See sources cited *supra* notes 51–53 and *infra* note 60; see also GUSTAVUS A. WEBER, *THE VETERANS' ADMINISTRATION: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 18–19 (1934) (“Although provision was made as early as 1802 for the widows and orphans of commissioned officers of the Regular Establishment who died as a result of their service, no such provision was made for the surviving dependents of enlisted men until 1836.”). Weber's characterization is slightly misleading. Although Congress did not provide for the traditional war widows of the rank-and-file as a routine matter until 1836, it did provide for specific classes of traditional war widows of soldiers starting in the 1810s. See sources cited *supra* notes 51–53.

55. See Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127, 128. The technical operation of the 1836 Act was complex. Section 3 granted service-based pensions to Revolutionary War widows and is intelligible only by reference to the veterans' pension act of 1832, which granted service-based pensions to nearly all Revolutionary War veterans of any rank, regardless of need. Act of June 7, 1832, ch. 126, § 1, 4 Stat. 529, 529–30. Section 3 of the 1836 Act awarded pensions to all widows whose husbands had been receiving a pension under the 1832 Act. Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127, 128. Section 2 of the 1836 Act also applied to Revolutionary War widows, granting arrears to those widows whose husbands had been pensioned under the 1832 Act but had died subsequent to its enactment. *Id.* § 2. Section 1 of the 1836 Act did not apply to Revolutionary War widows. Rather, it awarded pensions to traditional war widows of militia (of all ranks) who had “died while in the service of the United States” after April 20, 1818. *Id.* § 1, at 127–28; see also Letter from J. L. Edwards, Comm'r of Pensions, to Hon. Joel R. Poinsett, Sec'y of War (July 24, 1837), in *PENSION LAWS NOW IN FORCE*, H.R. DOC. NO. 25-118, at 109–10 (2d Sess. 1838) (observing that the “pension of July, 1836, was intended as a reward for the sufferings of those women who had husbands in the service during the revolutionary struggles”).

Over the following seventeen years, Congress gradually expanded the class of widows who qualified for service-based pensions under the 1836 Act to include virtually any widow of a Revolutionary War veteran, regardless of when the couple had married (which partially explains why the last Revolutionary War widow died in 1906),<sup>56</sup> and regardless of whether the widow had remarried (as long as she had been widowed again).<sup>57</sup> Hence, with the 1836 Act, and the subsequent early nineteenth-century statutes expanding the categories of widows eligible for service-based pensions, Congress promised cash assistance to tens of thousands of women who had been married at some point to a Revolutionary War veteran. The women pensioned by Congress under these acts were mostly aging widows who can be compared to today's recipients of Social Security survivors' benefits.<sup>58</sup> As one committee report explained, "[T]he provisions of the act [of 1836] were clearly intended to sustain the widow in her declining life."<sup>59</sup>

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56. See, e.g., Act of Mar. 3, 1837, ch. 42, § 2, 5 Stat. 187, 187 (granting life-time pensions to widows who had married a Revolutionary War veteran prior to 1783); Act of July 7, 1838, ch. 189, § 1, 5 Stat. 303, 303 (granting five-year pensions to all widows who had married a Revolutionary War veteran prior to 1794); Act of Mar. 3, 1843, ch. 102, § 1, 5 Stat. 647, 647 (granting one-year extension of pensions awarded to widows pursuant to the Act of July 7, 1838); Act of June 17, 1844, ch. 102, §§ 1–2, 5 Stat. 680, 680 (granting four-year extension of pensions awarded to widows pursuant to the Act of July 7, 1838); Act of Feb. 2, 1848, ch. 8, §§ 1–2, 9 Stat. 210, 210–11 (transforming widows' pensions awarded under the Act of July 7, 1838, into life-time pensions); Act of July 29, 1848, ch. 120, § 1, 9 Stat. 265, 265–66 (granting life-time pensions to all Revolutionary War widows married prior to 1800); Act of Feb. 3, 1853, ch. 41, § 2, 10 Stat. 154, 154 (granting life-time pensions to all Revolutionary War widows, regardless of when their marriage to a veteran took place). The last "Revolutionary War widow," Ester S. Damon of Vermont, died in 1906. GLASSON, FEDERAL MILITARY PENSIONS, *supra* note 39, at 94; see also File of Nina Alverson, W10365, Roll 48, Letter from G.G. Dibr[elt] to George C. Whiting, Comm'r of Pensions (Mar. 27, 1858); *id.*, Decl. of Nina Alverson (Mar. 5, 1866) (widow born in 1811 and married at age sixteen to veteran aged sixty-three); File of Rachel Arey, Roll 72, W9335, Decl. of Rachel Arey (Aug. 11, 1857); *id.*, Decl. of Nathan Underwood (Aug. 10, 1857) (widow born in 1792 and married to Revolutionary War veteran in 1828); File of Martha Rice, W11133, Roll 72, Decl. of Martha Rice (Apr. 6, 1855) (widow born eighteen years after the end of the Revolutionary War).

57. See, e.g., Act of Mar. 3, 1837, ch. 42, § 1, 5 Stat. 187, 187 (extending the Act of July 4, 1836 to those Revolutionary War widows who had remarried and then became widowed again); Act of Aug. 23, 1842, ch. 191, 5 Stat. 521, 521 (stating that under the Act of July 7, 1838, "the marriage of the widow, after the death of her husband . . . shall be no bar to the claim of such widow to the benefit of that act, she being a widow at the time she makes an application for a pension").

58. This is the case because widows of Revolutionary War veterans were awarded pensions starting fifty-three years after the close of that war. Based on my sample set, this large class of widows had a median age of seventy-nine at the time of their initial subsidy applications.

59. HOUSE COMM. ON REVOLUTIONARY PENSIONS, HEDULA PENNYMAN, H.R. REP. NO. 24-235, at 1 (2d Sess. 1837). The pensions awarded to widows varied with their husband's rank, the military division in which he served, and, in certain cases, his length of service. For example, while a widow of a high-ranking Navy officer could receive as much as fifty dollars per month, a widow of a seaman or low-ranking officer might receive only five dollars per month. *Compare*

While the national legislators gradually expanded the demographic reach of war widows' pensions and extended those pensions to the aging widows of veterans, they also tapped into the country's significant but contested land holdings to award land bounties to military widows—both traditional war widows and widows of veterans. Congress provided land bounties for war widows of officers and soldiers of the War of 1812 and the Mexican-American War.<sup>60</sup> Congress also retrospectively provided land bounties for various classes of widows of veterans based on the deceased husband's service in virtually any military encounter on behalf of the United States.<sup>61</sup> Most widows who received land bounties never acquired title to an actual parcel of land. Instead, they sold the land bounty warrants for cash on an established secondary market—a transaction that made the warrants a valuable source of financial assistance for widows.<sup>62</sup>

Although widows' military subsidies were by no means universal entitlements, they constituted a far-reaching program of social provision that benefited a significant number of women. Due to imperfect record keeping by the Pension Office then, and the limited resources available to the National Archives today, it is difficult to identify the total number of women who received pensions or land

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CONG. GLOBE, 34th Cong., 1st Sess. 1600 (1856) (observing that the widow of commodore Stephen Decatur had collected a pension of fifty dollars per month under the Act of Mar. 3, 1837, ch. 38, § 1, 5 Stat. 180), *with* File of Catharine Barr, NARA, Records of the Dep't of Veterans' Affairs, RG 15, Old Wars Pension Files, Widow's File 322, Letter from Catharine Barr to Sec'y of Navy (Feb. 14, 1842) (explaining that she had received a pension of five dollars per month following the death of her first husband). Thus, even as Congress significantly leveled the military pension system by awarding pensions to the rank-and-file, it did not completely eradicate the status-based nature of the system. However, especially given that many widows were eligible for substantial one-time arrears payments, even the smallest widows' pensions were comparable to the support available through local poor relief systems. See J.V.N. YATES, REPORT OF THE SECRETARY OF STATE IN 1824 ON THE RELIEF AND SETTLEMENT OF THE POOR, reprinted in THE ALMSHOUSE EXPERIENCE, COLLECTED REPORTS 1106 (David J. Rothman ed., 1971) (reporting that Richmond, Virginia, provided poor families with "between \$1.50, to \$4 and \$5" per month, depending on the size of the family).

60. For examples of statutes granting land bounties to traditional war widows, see Act of Dec. 10, 1814, ch. 10, § 4, 3 Stat. 146, 147; Act of Mar. 5, 1816, ch. 25, § 1, 3 Stat. 256, 256–57; Act of Feb. 11, 1847, ch. 8, § 9, 9 Stat. 123, 125–26.

61. For examples of statutes granting service-based land bounties to widows, see Act of Mar. 5, 1816, ch. 25, § 2, 3 Stat. 256, 257; Act of Feb. 11, 1847, ch. 8, § 9, 9 Stat. 123, 125–26; Act of Aug. 14, 1848, ch. 180, 9 Stat. 332, 332; Act of Sept. 28, 1850, ch. 85, § 1, 9 Stat. 520, 520–21; Act of Mar. 3, 1855, ch. 207, §§ 2, 8, 10 Stat. 701, 702.

62. See OBERLY, *supra* note 38, at 106 (observing that in the 1840s and 1850s "warrantees overwhelmingly chose to sell their [land] warrants for cash"); *id.* ch. 5 (describing the secondary market for land bounty warrants); Robert P. Swierenga, *The "Western Land Business": The Story of Easley & Willingham, Speculators*, 41 BUS. HIST. REV. 1, 4 (1967) (describing the business of frontier land investment firms that speculated in land warrants).

bounties under these public laws. Nevertheless, based on careful study of Pension Office records, we can calculate that between 1836 and 1860 at least 47,000 widows were granted pensions.<sup>63</sup> This calculation omits all widows awarded pensions prior to 1836, many of whose records were lost or destroyed, and about whom the Pension Office did not collect reliable data.<sup>64</sup>

It is also worth observing just how much time and energy Congress dedicated to widows' pensions. By the outbreak of the Civil War, Congress had enacted over ninety public law statutes authorizing and regulating the award of pensions and bounty lands to large classes of military widows. This tally does not account for the private relief statutes enacted for the benefit of individual women who sought pensions directly from Congress.<sup>65</sup> The result of this legislative effort was an entrenched and pervasive system of social provision for widows. In 1854, Triplett observed that the military subsidy system was "thoroughly incorporated into our policy," and that "there is hardly a neighbourhood in the United States which does not contain

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63. My estimate that at least 47,000 widows collected pensions from 1836 to 1860 exceeds estimates offered by Glasson and Resch, both of whom placed the number at approximately 23,000. See GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 39, at 95–96; RESCH, *supra* note 22, at 203, app. A. In large part, this is because Glasson and Resch included only Revolutionary War widows in their estimates, while my calculation includes at least certain classes of traditional war widows who received pensions between 1836 and 1861. The vagaries of early nineteenth-century recordkeeping make any estimation imperfect, and when in doubt I erred on the side of undercounting the number of widows receiving pensions. My calculation is based on careful examination of data contained in reports by the Commissioner of Pensions to Congress. See LOREN PINCKNEY WALDO, *REPORT OF THE COMMISSIONER OF PENSIONS*, H.R. EXEC. DOC. NO. 33-1, vol. 1, at 488, 495 (1st Sess. 1853); LOREN PINCKNEY WALDO, *REPORT OF THE COMMISSIONER OF PENSIONS*, S. EXEC. DOC. NO. 33-1, vol. 1, at 558–59 (2d Sess. 1854); J. MINOT, *REPORT OF THE COMMISSIONER OF PENSIONS*, H.R. EXEC. DOC. NO. 34-1, vol. 1, at 594 (1st Sess. 1855); J. MINOT, *REPORT OF THE COMMISSIONER OF PENSIONS*, H.R. EXEC. DOC. NO. 34-1, vol. 1, at 848 (3d Sess. 1856); GEORGE C. WHITING, *REPORT OF THE COMMISSIONER OF PENSIONS*, H.R. EXEC. DOC. NO. 35-2, vol. 2, at 706–09 (1st Sess. 1857); GEORGE C. WHITING, *REPORT OF THE COMMISSIONER OF PENSIONS*, H.R. EXEC. DOC. NO. 35-2, vol. 2, at 676–79 (2d Sess. 1858); GEORGE C. WHITING, *REPORT OF THE COMMISSIONER OF PENSIONS*, S. EXEC. DOC. NO. 36-2, vol. 2, at 825–28 (1st Sess. 1859); GEORGE C. WHITING, *REPORT OF THE COMMISSIONER OF PENSIONS*, S. EXEC. DOC. NO. 36-1, vol. 1, at 470–73 (2d Sess. 1860).

64. Although inadequate recordkeeping poses the greatest barrier to calculating the number of widows' pensions awarded prior to 1836, many of the pension records predating the War of 1812 were destroyed in a fire in November 1800 or during the invasion of the British army in August 1814. See File of Mary Hillyer, W92, Roll 1282, Unsigned Letter from Pension Office (Mar. 5, 1883) (noting the destruction of pension records due to the fire and the British invasion).

65. Although in Part II.B.3 I review some private bills for relief that were considered on appeal from the Pension Office, I primarily focus on the public laws that were enacted by Congress for the benefit of large classes of widows and administered by the Pension Office. For a discussion of the petitioning process used by widows who sought private relief because they did not qualify for a pension under a public law, see Collins, *supra* note 49, at 11–17.

one or more persons directly interested in some of the gratuities thus promised.”<sup>66</sup>

In a world in which government assistance of any sort is believed to have been unusual, the fact that such provision was made for women on a significant scale in the early nineteenth century was an enormously important development in American social policy. Well before the emergence of the modern welfare state in the early twentieth century, Congress created a broad-scale, demographically far-reaching system of social provision that provided direct assistance to women. The existence of this system should lead us to revise the received wisdom concerning the origins of centralized social provision for women generally. Such provision did not begin with the Social Security Act of 1939, or the Mothers’ Aid statutes of the Progressive Era, or even the Civil War widows’ pensions.<sup>67</sup> Rather, centralized social provision for women began in the early nineteenth century, as Congress created a significant system of cash and land subsidies for women awarded on the basis of marriage to a man who, at some point, had served in the nation’s military.<sup>68</sup>

### *B. Marriage and Women’s Welfare in the Early Nineteenth Century*

If the story of widows’ military subsidies in the early nineteenth century is an underexplored chapter in the history of the development of social provision for women, it is also an important and unexamined aspect of the evolution of marriage’s socio-legal significance. From our perspective today, the notion that marriage can give a woman a claim on the public coffers seems commonplace, perhaps especially when that financial assistance is directed toward the “worthy widows” of soldiers and veterans. But it is all too easy for

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66. TRIPLETT, *supra* note 43, at iii.

67. See *supra* notes 16–20 and accompanying text.

68. Provision for widows and veterans is part of a larger web of social welfare policies in early nineteenth-century America, from disaster relief to homestead exemption acts, the full scope of which is just now coming to light through the efforts of scholars in law and other disciplines. See JENSEN, *supra* note 22, at 236 (observing that early nineteenth-century veterans’ military subsidies provide a “new origins story about the development of . . . the American welfare state”); Michele L. Landis, “*Let Me Next Time Be ‘Tried by Fire’*”: *Disaster Relief and the Origins of the American Welfare State, 1789–1874*, 92 NW. U. L. REV. 967, 969 (1998) (arguing that “the origin of the American welfare state is found in the narratives of blame and fate that surfaced originally in eighteenth- and early nineteenth-century contests over ‘disaster’ relief”); Alison D. Morantz, *There’s No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 250 (2006) (describing nineteenth-century homestead exemption acts as an early form of family welfare policy and noting that “scholars have only recently begun to recognize . . . that debate over the proper scope and aims of the ‘social safety net’ began long before the New Deal”).

us to view provision for widows as a natural function of government because, in our own time, widows (and now widowers) are routinely compensated for the deaths of their spouses through all manner of public and private law mechanisms, from marriage-based entitlements such as Social Security survivors' benefits and workers' compensation, to tort remedies in wrongful-death actions.<sup>69</sup> However, in the early nineteenth century, marriage did not generally give widows a claim on the public purse. Rather, what little enforceable financial support marriage secured for women was effected through private law. As I demonstrate in this Section, widows' military subsidies therefore marked the emergence of an unorthodox role for marriage: the creation of *public* liability for women's support through marriage-based entitlements.

As others have chronicled in great detail, a core socio-legal function of marriage in the nineteenth century was the creation of a private sphere in which women could be properly protected and governed, their energies directed to gender-appropriate tasks (such as motherhood and household labor), and their material needs provided for.<sup>70</sup> Marriage, in other words, helped to both create and provide for women's financial dependency. Once a woman married, the law limited her opportunities to engage in employment outside the home. A married woman could not enter a contract without her husband's permission, and hence she could not engage in trade without a special license to do business as a "feme sole trader."<sup>71</sup> Marriage also resulted

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69. See, e.g., 42 U.S.C. § 402 (2006) (providing Social Security benefits for the widows and widowers of insured individuals); MD. CODE ANN., LAB. & EMPL. § 9-632 (LexisNexis 2008) (providing right to workers' compensation for surviving spouses); N.Y. WORKERS' COMP. LAW § 16 (Consol. 2009) (workers' compensation statute defining death benefit for surviving spouses); N.C. GEN. STAT. § 97-39 (2009) (presuming widow and widower dependent for purposes of determining workers' compensation); VA. CODE ANN. §§ 8.01-50 to -56 (2008) (providing wrongful-death action for surviving spouses); see also JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 127 (2005) (noting that "the problem of the 'destitute widow and children' [was placed] at the center of the workmen's compensation movement" of the early twentieth century).

70. See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 67 (1982) (observing that during the antebellum period, the laws of coverture were rationalized as a form of guardianship of the husband over the wife); NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 1-2 (2d ed. 1997) (observing that the "cult of domesticity . . . prescribed specific behavior for women in the enactment of domestic life"); Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082 (1994) ("The common law charged a husband with responsibility to represent and support his wife, giving him in return the use of her real property and absolute rights in her personality and 'services'—all products of her labor.").

71. See MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 44 (1986) ("If women lived in areas that recognized the law of feme sole traders . . . they could



in a nearly complete abdication of the wife's property rights—including rights to any property she owned prior to marriage and any wages she earned during marriage.<sup>72</sup> As a consequence, the common law rendered women completely dependent upon their husbands for material support during marriage.<sup>73</sup>

In exchange, the common law obligated a husband to support his wife and children. During his lifetime, that obligation was enforced indirectly through the "doctrine of necessities," which required a husband to pay merchants for his wife's purchase of necessary goods.<sup>74</sup> The common law also secured at least some material support for a woman following the death of her husband. If a widow's husband owned real property, she had a claim to "dower," a life estate in one-third of real property owned by her husband during marriage.<sup>75</sup> With respect to the husband's chattel property, after creditors took their

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execute binding contracts, sue, and be sued just as though they were single. Such rights were essential if women wanted to operate their own businesses . . .").

72. Marylynn Salmon provides a good synthesis of marriage's impact on a woman's property rights under the doctrine of coverture:

After marriage, all of the personal property owned by a wife came under the exclusive control of her husband. He could spend her money, including her wages, [and] sell her slaves or stocks . . . . With regard to real property his rights were almost as extensive. He made all managerial decisions concerning her lands and tenements and controlled the rents and profits.

*Id.* at 15; see also CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* 36 (1987) ("Upon marriage, all of a woman's personalty became her spouse's. . . . She could only write a will bequeathing personalty if her husband gave his approval, and under the common law she had no power to devise land."); TAPPING REEVE, *THE LAW OF BARON AND FEMME*, ch. 2 (Amasa J. Parker & Charles E. Baldwin eds., 3d ed., Albany, William Gould 1862) (1816) (describing the husbands' right to his wife's property during coverture). With the enactment of married women's property acts toward the end of the early nineteenth century, these rules slowly began to change. See Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 3-5 (1985) (describing "married women's property reform" of the early nineteenth century).

73. For a rich examination of how marital property law helped to create and perpetuate women's financial dependency, see Siegel, *supra* note 70, at 1082-89. Prior to marriage, and sometimes even after marrying, women could effectively contract around many of the restrictions on married women's ownership and management of property using "marriage settlements" that were enforced in equity. For a detailed discussion of the use of marriage settlements in the late eighteenth and early nineteenth centuries, see Marylynn Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 to 1830*, 39 WM. & MARY Q. 655, 656 (1982) ("In their various forms, marriage settlements allowed women full or partial managerial rights over property.").

74. See REEVE, *supra* note 72, at 160 (noting that a husband is "bound by his wife's contracts for necessities"). For a discussion of the doctrine of necessities, see Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 11-12 (2003).

75. REEVE, *supra* note 72, at 102. For a probing discussion of dower, its shortcomings as a means of securing widows' financial stability, and dower reform statutes of the early twentieth century, see Dubler, *Shadow*, *supra* note 10, at 1660-1700.

share the widow was entitled to a "widow's third," with the remaining portion divided among the husband's children or other heirs.<sup>76</sup>

Although there is reason to doubt its efficacy in securing women's financial security,<sup>77</sup> this complex web of laws both reflected and reinforced a deep ideological commitment to the private marital family as the normatively appropriate source of support for women and other family dependents. That commitment was reflected in and reinforced by the scarcity of government assistance available to women generally, including married women. If and when private liability rules failed to adequately provide for a married woman—and when the kindness of family, friends, and charity ran out—she could turn to municipal-based poor relief.<sup>78</sup> Although there was significant variation in the treatment of paupers over the course of the early nineteenth century, as a general matter public, need-based sources of material support were reserved for only the poorest members of a community and were notoriously punitive and stingy.<sup>79</sup> Women seeking poor relief might be "farmed out" and forced to live and labor in another's home.<sup>80</sup> They could be made to live and work in an

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76. See REEVE, *supra* note 72, at 98. If the husband had no children, the widow was generally entitled to half of his personal property. *Id.*

77. See Dubler, *Shadow*, *supra* note 10, at 1662 ("A widow's legal entitlements to dower and her paraphernalia, although framed by the law as protective measures . . . , did little systematically to alleviate her often precarious financial state after her husband's death.")

78. As Mimi Abramovitz has explained, "local government assumed responsibility [for the poor] only when . . . family members could not." ABRAMOVITZ, *supra* note 16, at 84.

79. The poor laws enacted by municipalities provided subsistence-level support for the most destitute members of a community, including women and their children. See Alexander Keyssar, *Widowhood in Eighteenth-Century Massachusetts: A Problem in the History of the Family*, 8 PERSP. AM. HIST. 83, 112 (1974) ("In cases of extreme need, the town would even assume the burden of supporting an indigent widow."). While poor relief did not turn on marital status, a woman's marital status could potentially influence her poor relief eligibility in at least two ways. First, because municipalities provided poor relief only for those individuals domiciled in the town, determination of an individual's domicile was central to determining which town would be liable for the individual's support. Because a woman's domicile followed that of her husband, a town might dispute whether it was liable for a married woman's relief if her husband was domiciled elsewhere. See ABRAMOVITZ, *supra* note 16, at 82 (discussing how a woman's marital status played an important role under the provisions of colonial settlement laws). However, in such cases, marital status functioned less as an eligibility criterion than as a means to allocate liability among towns. Second, there is evidence suggesting that towns administered poor relief in a gender and marriage-salient manner, so that a more lenient standard was used to determine a widowed mother's eligibility for poor relief, as compared with a similarly destitute man or unmarried mother. See *id.* at 81 (noting the particular difficulty for unwed mothers in receiving assistance under the poor laws). Evidence supporting a bias in favor of married mothers is inconsistent, however, see *id.*, and in any event, marital status did not entitle a woman to poor relief.

80. See ABRAMOVITZ, *supra* note 16, at 86–87 (explaining the process of "farming-out," by which the services of female paupers were "auctioned-off to the lowest town bidder").

almshouse.<sup>81</sup> And in particularly punitive jurisdictions, women who became public charges could be subjected to physical punishment.<sup>82</sup> Their children, if any, would very possibly be “bound out” to servitude so that the town could avoid incurring charges for the children’s support.<sup>83</sup>

In an era when marriage was intended in part to provide for women’s material needs within the private family, and when social provision was generally stigmatized, widows’ military subsidies are especially notable for employing marriage as a basis for women’s claim on the public coffers. Creation of a broad-scale marriage-based entitlement thereby altered, or broadened, the legal significance of marriage, both for the individual women involved and for the polity. With respect to a significant group of women, marriage no longer created only private liability; it could also generate public liability. If in the past marriage had functioned to insulate the polity from women’s financial needs (although not always particularly effectively), now, in certain circumstances, marriage could also render the state responsible for women’s support.

### *C. Legislative Change, Legislative Resistance*

It is tempting to understand widows’ military subsidies as simply an extension of the private law regime described above. In other words, by creating military subsidies, Congress substituted the state for the husband-provider, thereby maintaining the marital family as the locus of women’s support. Under this logic, widows’ military subsidies were not a significant departure from the private law regime that traditionally provided for women within the marital family. While it is certainly the case that widows’ military subsidies tracked the private law in important ways—reproducing the provider/dependent model of the private law—we should not underestimate the novelty of publicly funded marriage-based entitlements in the early nineteenth century. They were novel, as I have argued above, because of the scarcity of government assistance in general, and because of the relatively limited nature of the private

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81. See *id.* at 87–89 (describing the labor obligations of women who lived in almshouses).

82. See *id.* at 86 (discussing the “harsh physical punishment” that female paupers sometimes endured).

83. See *id.* at 92–93 (noting the orders of one colony’s officials):

[T]hose that have relief from the town and have children and do not employ them that then it shall be lawful for the township to take order that those children shall be put to work in fitting employment according to their strength and abilities or placed out by the town.

law's provision for married women's financial security. As I show in this Section, that novelty is also reflected in the structure of subsidy statutes, and in the legislative record. Early nineteenth-century legislators could not and did not presume that marriage gave rise to public liability, even as compensation for a husband's military services or his death in battle. Indeed, although by the mid-nineteenth century a significant system of marriage-based entitlements was entrenched as a form of social provision, opponents of widows' military subsidies continued to challenge the propriety of such a system.

On a technical level, the private law regime that governed the relations of husband and wife, and secured minimal financial security for wives, did not readily translate into a public law system of marriage-based entitlements. We can detect the problems that confronted national legislators in treatise writers Mayo and Moulton's strained attempt to describe the legal principles undergirding widows' military subsidies. On the one hand, they explained, widows were the "natural and civil dependents of their husbands" while living and "might therefore be considered as justly entitled to the continuance, nay the inheritance, of the right, *virtually as a vested right*, of pension, at the death of their said natural and civil protectors."<sup>84</sup> "But," they explained, "inasmuch as they were not identical with the parties disabled, nor considered as the heir or inheritors of the vested right of pension, . . . it was deemed to require the action of Congress to recognize their right, and to prescribe at their option the amount of pension they might award them."<sup>85</sup> In other words, despite married women's status as dependents, traditional legal principles and precedents did not give a widow a claim on the government for compensation based on her husband's death in battle or his military service.

Crafting a system that prioritized widows' material well-being thus required significantly more legislative effort than simply substituting the state for the husband. It required Congress to abandon many of the fundamental principles of traditional intestacy law and design a new set of distribution rules. While the private law regime described above was intended, in part, to provide for the deceased husband's widow, it was also designed to ensure satisfaction of creditors' claims and the continuation of the family firm or farm,

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84. MAYO & MOULTON, *supra* note 42, at xxvi–xxvii (emphasis in original).

85. *Id.* at xxvii.

largely through transfers to heirs.<sup>86</sup> But in creating widows' military subsidies, Congress focused primarily on widows' welfare as well as that of any minor children. For example, under traditional intestacy law, the husband's chattel property was first subject to creditors' claims and then divided among the widow and the heirs. By contrast, the military pension statutes prioritized first the widow and then any children as the recipients of the cash subsidy, to the exclusion of creditors.<sup>87</sup> Similarly, as early as 1814, military land bounty statutes prioritized first the widow and then any children as recipients of the military bounty land in the event of a soldier's death, before other family members.<sup>88</sup> This, too, marked a departure from traditional

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86. As John Langbein has explained with respect to the widow's right to dower, "the tendency both in intestacy and for testate estates was to limit the widow to a life interest, in order to assure continuity of the enterprise in the hands of the next generation." John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 726 (1988).

87. If the deceased soldier or veteran had children, they received nothing directly while the widow remained alive and unmarried. Only children under the age of sixteen were eligible to receive a pension, and then only in the event of the mother's death or remarriage. See, e.g., Act of July 4, 1836, ch. 362, § 1, 5 Stat. 127, 127-28. Congress explicitly insulated many military subsidies from the claims of creditors, thus ensuring that these subsidies would be available for the support of the soldier's or veteran's widow or children and would not be used to pay his debts. See, e.g., Act of June 19, 1840, ch. 39, § 1, 5 Stat. 385, 385; Act of July 4, 1836 § 4; Act of May 6, 1812, ch. 77, § 4, 2 Stat. 728, 729-30. Opinions issued by the Attorney General reiterate this policy. See Letter from W.M. Wilkins, War Dep't, to James Edwards, Comm'r of Pensions (July 18, 1844), in MAYO & MOULTON, *supra* note 42, at 555, 555-56 ("The policy of the act of Congress of the 7th of June, 1832, and of other pension laws, appears to be to keep from creditors and from the seizure of the law, in any way, the gratuities or pensions conferred upon revolutionary officers and soldiers."); Letter from J.Y. Mason, Att'y General, to Sec'y of War (July 14, 1846), in MAYO & MOULTON, *supra* note 42, at 481, 481-82 (explaining that the Act of June 19, 1840 directed administrators of veterans' estates to make payment directly to the children of the veteran, even where intestacy law would normally require payment of debts of the estate); cf. WITT, *supra* note 69, at 53 (observing that New York's mid-nineteenth-century wrongful-death statute excluded creditors as potential beneficiaries of claims brought by widows); Morantz, *supra* note 68 (analyzing middle and late nineteenth-century Homestead Acts as a social safety net for families).

88. Consistent with traditional intestacy law, until 1814 land bounty statutes tended to designate "heirs and representatives" of soldiers as the beneficiaries of the land bounty in the event of the soldier's death, a designation that did not necessarily include the widow. See Act of July 5, 1813, ch. 4, § 2, 3 Stat. 3; Act of May 6, 1812, ch. 77, § 1, 2 Stat. 728, 728-29; Act of Feb. 6, 1812, ch. 21, § 6, 2 Stat. 676, 677; Act of Jan. 11, 1812, ch. 14, § 12, 2 Stat. 671, 672-73; Act of Dec. 24, 1811, ch. 10, § 2, 2 Stat. 669, 669-70. However, during the War of 1812, land bounty statutes began to explicitly designate the widows as the priority beneficiary of the bounty. An 1814 bounty land statute identified "the widow and children, and if there be no widow nor child, the parents of every non-commissioned officer and soldier" as the recipients of the land bounty, and insisted also that "the same shall not pass to collateral relations." Act of Dec. 10, 1814, ch. 10, § 4, 3 Stat. 146, 147. An 1847 bounty land statute gave even more detailed distribution rules: "first, to the widow and to his children; second, his father; third, his mother." See Act of Feb. 11, 1847, ch. 8, § 9, 9 Stat. 123, 125. Consistent with the family welfare agenda of military subsidies, bounty land statutes were interpreted by the Attorney General to limit the divisibility of a bounty land warrant by the soldier himself, based on the understanding that "[t]he clear design

private law norms, under which widows received only a life estate in one-third of all real property owned by the husband during marriage, not a right to ownership in fee simple of an entire parcel.

Unsurprisingly, the creation of a system that used marriage as a basis for public liability for women's support, and did so in ways that abrogated traditional rights of heirs and creditors, gave rise to legislative debate. Given the sheer number of widows' subsidy bills, both public and private, that came before Congress over the course of the early nineteenth century, national legislators had numerous occasions to debate the propriety of providing for women based on their marriage to a soldier or veteran. Although particular bills presented to Congress raised issues specific to the individual widow or widows who would benefit, general fault lines emerged in these debates. Because military subsidies smacked of government handouts, not all legislators were comfortable with the use of public assets to provide for widows—not even “worthy widows”—and certainly not to the degree that pro-subsidy legislators contended. Echoing objections that were levied against the military pension system generally (including veterans' pensions), opponents of widows' subsidies claimed that the military pensions were a weakly disguised form of “charity.”<sup>89</sup> Pension naysayers in Congress insisted that government provision for widows was contrary to republican principles of self-support, and at odds with America's constitutional design.<sup>90</sup>

The charge of “charity” caught pro-pension legislators in something of a bind. Widows' champions in Congress routinely called attention to widows' poverty and need as a justification for creating a subsidy—a defense that indeed made widows' military subsidies seem like a form of charity.<sup>91</sup> In an effort to justify widows' military

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[of the statutes] was to secure the bounty for the family of the deceased.” Letter from Johnson, Att’y Gen.’s Office, to Sec’y of the Interior (June 28, 1850), in MAYO & MOULTON, *supra* note 42, at 518, 518.

89. CONG. GLOBE, 26th Cong., 2d Sess. 50 (1841) (statement of Sen. Calhoun) (“[T]he pension list was no more than a great system of charity. . . . It went under the name of charity, but its true name was plunder.”); *see also id.* (“Plunder, and not pension, was the proper word to apply to many of the sums claimed as navy pensions; and in this class [i.e., Revolutionary War].”); *see also* JENSEN, *supra* note 22, at 75–78.

90. CONG. GLOBE, 23d Cong., 1st Sess. 111 (1834) (statement of Rep. Pinckney) (arguing that the “whole pension system was established without constitutional authority”). Fifteen years later, in the context of debating a widow's pension petition, one Senator went so far as to declare that “if the Republic is destined to go to ruin . . . it is to be more in consequence of the manner in which the public funds are used than any other cause”—suggesting that pensions, not slavery, would bring down the Union. CONG. GLOBE, 30th Cong., 2d Sess. 540 (1849) (statement of Sen. Metcalfe).

91. *See, e.g.*, CONG. GLOBE, 30th Cong., 1st Sess. app. 932 (1848) (statement of Rep. Silvester) (describing Revolutionary War widows as “a modest and retiring class of persons,

subsidies as something other than "mere gratuity," pro-pension legislators positioned widows' pensions as a form of remuneration, not only for their husbands' military services,<sup>92</sup> but, as I have demonstrated elsewhere, also and especially for the widows' own services as wives.<sup>93</sup> For example, while advocating for the extension of a widows' subsidy act in 1818, Representative Harrison of Ohio explained that "[t]he pious and patriotic mothers to whom [the pension] will be given will employ it in the education of their sons, and they will never cease to remind them of the obligations they owe to their country."<sup>94</sup> Legislators also routinely called attention to widows' service to the nation in wartime, and their caregiving services to their husbands as a justification for subsidies.<sup>95</sup> In these legislators' accounts, marriage to a soldier or veteran functioned as a proxy for women's services of various sorts, whether to country or to husband.

But for adamant opponents of widows' subsidies, marriage to a soldier or veteran—and the different forms of labor and sacrifice marriage regularly entailed for women—did not justify government assistance, in part because marriage itself was intended to provide for women's financial security. In 1843, in the course of contesting the legitimacy of certain service-based pensions for widows, Senator George McDuffie demanded to know "upon what principle of policy or justice a claim could be set up by a widow, . . . unless it were shown that she had participated in the struggle, and had been subjected to

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unable to help or provide for themselves, and who have been cast by adversity and misfortune upon the protection and charity of their country"); CONG. GLOBE, 27th Cong., 3d Sess. 389 (1843) (statement of Sen. Buchanan) ("Every person could point to cases, within his own immediate vicinity, of destitute widows of revolutionary soldiers, who are supported by the liberality of their friends; and who, in case the bill did not pass, must go to the poor-house.").

92. For an example of justifications of widows' pensions based on *husbands'* service as soldiers, see, e.g., CONG. GLOBE, 28th Cong., 1st Sess. app. 535 (1844) (statement of Rep. Seymour):

[Widows' pensions are] founded on the well-known fact, that their husbands, whose surviving representatives they are, were in truth the creditors of the government, and had a just claim upon its bounty; and that this claim was not discharged by the death of the pensioned husband, but remained to his widow, who had shared with him the privations and destitution consequent upon his services.

93. See Collins, *supra* note 22, at 1795 ("[I]n their effort to justify a claim on the public coffers . . . widows could not allude to valorous deeds in battle or courageous conduct in the face of grievous wounds, but they could, and did, invoke their service to the nation as mothers.").

94. 33 ANNALS OF CONG. 381 (1818).

95. See, e.g., CONG. GLOBE, 27th Cong., 3d Sess. 388 (1843) (statement of Sen. Smith) (supporting a widows' pension bill "not on the ground of a gratuity, but because the females of that day were all more or less compelled to make sacrifices, and had besides rendered material services"); CONG. GLOBE, 31st Cong., 1st Sess. 681 (1850) (statement of Rep. Venable) ("It was right to give to the widow something, some compensation for the years of anxiety and care spent over her husband who fell under the effects of . . . wounds received in the service.").

the privations incident to the time[?]"<sup>96</sup> His colleague Senator Rufus King put the point more bluntly by questioning the deservingness of the widows in question: "[T]he widows, who seemed to claim so large a share of the gentleman's attention, never did any service. . . . These old women had married over and over again, and now came to claim pensions from the Government."<sup>97</sup> Marriage, he reasoned, was a source of financial gain for "these women," not a status that warranted compensation by the federal government:

What merit was there in these women marrying officers and soldiers of the Revolution after the war, that they should be entitled to pensions? Matches with officers were desirable. . . . Did they suffer any losses from the marriage after the close of the war and as late as 1794? Or were they harassed by revolutionary troubles? No, sir. Go to the Pension Office, and you will find that most of these widows who had married those old revolutionary officers, soon after their deaths provided themselves with young husbands.<sup>98</sup>

According to these legislators, marriage to a soldier or a veteran was itself a source of pecuniary gain for widows, one that need not be subsidized by the government. "These were beautiful times," King proclaimed, "to make gratuities of a half a million dollars to old women who never rendered any service whatever to the country."<sup>99</sup>

Senators McDuffie and King and others who spoke out against widows' military subsidies clearly held a minority view. By the middle of the nineteenth century, provision for military widows had become commonplace and pro-pension legislators reasoned comfortably about widows' subsidies in terms acknowledging that marriage could give women a special claim on the polity for material support. This way of reasoning about women's legal rights as wives was reflected in one widow's spirited proclamation: "It is no more than right that our Country should allow us that mite for our own Exclusive use."<sup>100</sup> It was also reflected, of course, in the marriage-based entitlements themselves.

But the ultimate creation of a significant system of widows' military subsidies should not obfuscate what careful attention to the structure of the subsidy statutes and the legislative history reveals: the use of marriage as a basis for redistributive policy was by no means inevitable or predetermined in the early nineteenth century. At

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96. CONG. GLOBE, 27th Cong., 3d Sess. 388 (1843).

97. *Id.*

98. *Id.* at 389.

99. *Id.* at 388.

100. File of Catherine Barr, NARA, Records of the Dept of Veterans' Affairs, RG 15, Old Wars Pension Files, Widow's File 322, Letter from Catharine Barr to Comm'r of Pensions (June 20, 1858).



a time when social provision was largely limited to poor relief, the development of widows' military subsidies gave rise to substantial debate over whether, in fact, they were a form of government "charity." And at a time when marriage was understood as a status that secured material support for women within the marital family, widows' military subsidies challenged the core vision of the private marital family as an adequate source of women's financial support.

As I explain in the next Part, resistance to the use of government assets to provide for military widows was not limited to a handful of legislators. Careful examination of widows' military subsidy applications reveals that the federal administrators assigned the task of implementing this complex system of marriage-based entitlements also resisted public liability for women's support. And they did so not by objecting to widows' military subsidies in principle, but by effectively narrowing the legal definition of marriage.

## II. CONSTRUCTING MARRIAGE IN EARLY ADMINISTRATIVE LAW

[W]hat constitutes a legal marriage[?] It is impossible that any question should be more important to any one in itself, or in the consequences which it involves, than whether he or she is or is not a husband, or a wife; and yet some uncertainty may often rest upon it, not merely from the peculiar facts of individual cases, but from a want of precision and certainty in the principles or rules which decide this question.<sup>101</sup>

The military subsidy statutes enacted by Congress granting large classes of widows an enforceable right to cash and land subsidies ushered in a new kind of social provision for married women and, importantly, a new adjudicative process for resolving widows' legal claims. Eligibility determinations for military subsidies were not made in courts; they were made through a relatively elaborate federal administrative system that developed over the course of the early nineteenth century. Through these processes, low-level administrators were required to implement the innovative form of social provision that Congress had created: the marriage-based entitlement. In that role, administrators had to contend with a significant problem in nineteenth-century family law: What constituted a legal marriage?

Histories of the legal regulation of marriage in the nineteenth century have traditionally focused on courts and have demonstrated how early nineteenth-century judges tended to employ a broad definition of legal marriage through liberal evidentiary requirements

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101. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 557 (3d ed., Boston, Little, Brown 1857).

and the common law marriage doctrine.<sup>102</sup> In this Part, I depart from this traditional, court-centered approach by shifting the focus from private law to public law, from judges to administrators. I then consider whether the legal construction of marriage differed in an alternative institutional context. Did it matter to the legal construction of the family that this system of provision was a product of public law rather than private law? Did it make a difference that women claiming military subsidies were required to establish the validity of their marriages with administrative officials rather than judges?

Careful examination of over 300 widows' military subsidy applications reveals that institutional context and fiscal incentives did indeed make a difference to how marriage was defined in and through the law. While early nineteenth-century judges tended to stretch legal standards in order to find the existence of a legal marriage in the context of private law litigation, administrative officials tended to be suspicious, rather than solicitous, of widows' alleged marital status. The records show that pension administrators stalled and thwarted women's pension claims by employing a narrow, bureaucratic definition of marriage. And they did so even as Congress and high-ranking executive branch officials pushed the Pension Office to apply the broader definition of marriage used in courts, making this a story about bureaucratic disentanglement: administrators' use of procedural hurdles to delay or deny benefits to eligible persons.<sup>103</sup>

The fundamental question I consider in this Part is why did these administrators resist the capacious definition of marriage used in the courts? One important part of the answer lay in the fiscal incentives created by a broad-scale system of marriage-based entitlements. Where government funds, rather than private assets, were at stake, legal officials charged with allocating marriage-based entitlements tended to emphasize marriage's role as a system of closure rather than inclusion, thereby limiting the public costs of

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102. See *infra* Part II.A.

103. See Michael Lipsky *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984) (defining "bureaucratic disentanglement" as a mode of "programmatic retrenchment" in which "obligations to social welfare beneficiaries are reduced . . . through largely 'bureaucratic' actions and inactions of public authorities"). In certain respects, the pension clerks resembled the legalistic administrators described by William Simon in his discussion of modern welfare workers. See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1198–99 (1983). For a recent discussion of modern-day desk clerks' power to effectively make law concerning marital name changing, even absent delegated discretion, see Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 823–27 (2008).

women's dependency by manipulating the operative legal definition of marriage. However, this is not exclusively a story about fiscal incentives. As I show below, in the context of administering the first broad-scale marriage-based entitlement program, a combination of ideological, fiscal, and institutional pressures led to the development of a license-based definition of legal marriage well over half a century earlier than is generally thought.

First, I provide a brief overview of the legal regulation of marriage in early nineteenth-century courts—courts known for their capacious definition of marriage. Next, I turn to the contemporaneous experience of women who sought military subsidies, and particularly to their difficulties in proving marriage in administrative proceedings. The resulting picture is of two very different doctrinal conceptions of legal marriage, which, when applied in their respective institutional contexts, served a similar fiscal and ideological end: limiting the polity's liability for women's dependency.

#### *A. Courts, Private Contracting, and Public Marriages*

To understand the significance of the Pension Office's general resistance to widows' claims of marital status, one must first know something about the regulation of marriage in the early nineteenth century in other institutional contexts. Federal administrators' refusal to recognize the marriage of Thankful Reynolds—the widow described in the opening vignette of this Article—may seem quite sensible to us today, given that paperwork, licenses, and registration have become part and parcel of what we understand as legal marriage.<sup>104</sup>

However, marriage was not always such a clearly demarcated and well-documented legal status. In the early nineteenth century, licensing and registration schemes were often optional and underutilized.<sup>105</sup> Legislatures tended to play a secondary role in the regulation of marriage, as statutes regulating marriage were frequently underenforced. Instead, the common law judge—the central figure in nineteenth-century legal history—played the leading role in

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104. For an engaging and edifying exposition on the rise and function of the marriage license, see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

105. See GROSSBERG, *supra* note 10, at 64–78. In this Article, I focus on the laws and practices governing marriage in those states that, generally speaking, followed the English legal tradition (even if they departed from specific English doctrines of marriage law). For discussions of marriage law in regions following the Spanish and French legal traditions, see Hans W. Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1 (1975); Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 1 (1979).

the regulation of marriage. Most courts of the period demonstrated a strong bias toward recognizing the legitimacy of a given marriage, both through the application of liberal evidentiary standards and, in a majority of states, the recognition of common law marriage.<sup>106</sup> The legal maxim *semper praesumitur pro matrimonio*, always presume marriage, fairly characterized the judicial posture toward marriage.<sup>107</sup> According to Chief Justice James Kent's leading 1809 opinion on the subject, marriage could "be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. . . . No formal solemnization of marriage was requisite."<sup>108</sup> As Ariela Dubler has explained, "Common law marriage, as a doctrine, took a nonsolemnized relationship and granted it the legal title of marriage because, in a social sense, the parties to the relationship *acted like they were married*."<sup>109</sup>

Historians have offered different explanations for early nineteenth-century judges' liberal approach to marriage. In part, judicial recognition of common law marriage grew out of the fact that many local governments lacked mandatory licensing or registration systems during the early nineteenth century, and even where such systems were in place, couples often lacked access to officials qualified to perform marriage ceremonies.<sup>110</sup> But it was not simply necessity that led to the recognition of common law marriage. According to Michael Grossberg, judges contributed to the underenforcement of marriage regulations by treating licenses as "administrative aids instead of regulatory devices."<sup>111</sup> Grossberg characterizes debates over

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106. See GROSSBERG, *supra* note 10, at 73–83. It is important to note that there was another model of marriage regulation available in the eighteenth and nineteenth centuries. Liberal judicial regulation of marriage in America contrasted with the rigid statutory regime that the English Parliament put in place in 1753, which required compliance with strict licensing, ceremonial, and registration procedures. See Lord Hardwicke's Marriage Act, 1753, 26 Geo. 2, c. 33 (Eng.); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500–1800*, at 35–37 (1977).

107. See 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* 374 (6th ed., Boston, Little, Brown 1881) (1852) ("Every intendment of the law is in favor of matrimony.").

108. *Fenton v. Reed*, 4 Johns. 52, 52 (N.Y. Sup. Ct. 1809) (per curiam); GROSSBERG, *supra* note 10, at 70.

109. Dubler, *Wifely Behavior*, *supra* note 10, at 963; see also COTT, *supra* note 25, at 39 ("Except in the few states that absolutely prohibited or nullified self-marriage by law, courts were generally satisfied when a couple's cohabitation looked like and was reputed in the community to be marriage, whether or not authorized ceremonies could be documented.").

110. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 722–23 (1996).

111. GROSSBERG, *supra* note 10, at 77; see also Bowman, *supra* note 110, at 723–32.

regulation of marriage and marriage rites as reflecting a tension between contractual freedom and state intervention, in which judicial recognition of common law marriage was an instance of deference to the "private nature of contracts" that "relied on the self-regulation implicit in such agreements for nuptial supervision."<sup>112</sup> As such, he argues, recognition of common law marriage betrayed "a republican ethos that weakened public regulation of matrimony, whether by parents, the local community, or the state" and revealed support for the view that "the commonwealth was better served by judicially supervised self-regulation than by public scrutiny."<sup>113</sup>

Others have eschewed contractual and privacy-based explanations of the common law marriage doctrine, emphasizing instead its ascriptive dimensions. For example, Nancy Cott argues that "although state authority seemed to back away in the acceptance of common-law marriage, the result of this acceptance was to widen the ambit of the state's enforcement of marital obligations, duties, and rewards and to reinforce state support for monogamous marriage as an institution."<sup>114</sup> Similarly, Dubler shows how the rhetoric of the sanctity of private contract found in many judicial opinions defending common law marriage was in part driven by an effort to broaden the regulatory reach of marriage. She contends that "[t]hrough the labeling of unsolemnized sexual unions as marriages, [courts] affirmed state support for the institution of marriage and all its attendant obligations."<sup>115</sup> According to Dubler, the judiciary's readiness to bring unsolemnized relationships within the ambit of legal marriage was animated by both moralist and materialist concerns. Many of the cases in which marital status was litigated were brought by women seeking support from a would-be husband or his estate. In this context, rather than face the "spectacle of women in potential relationships of dependency with the state," judicial enforcers of common law marriage preferred to shift "such dependencies back to what was perceived to be their natural and proper place."<sup>116</sup> Thus, Dubler reasons, "[W]ithin the framework of contract, courts effectively privatized the dependencies of women and children within the private sphere of the family."<sup>117</sup>

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112. GROSSBERG, *supra* note 10, at 69–70.

113. *Id.* at 70.

114. Cott, *supra* note 10, at 120.

115. Dubler, *Governing*, *supra* note 10, at 1906.

116. *Id.* at 1918.

117. *Id.* at 1908.

Not all early nineteenth-century judges recognized common law marriage in the broad terms propounded by James Kent. Massachusetts jurist Theophilus Parsons, for example, insisted that lawful marriage “must be celebrated before a clergyman in orders,” thereby rejecting the doctrine of common law marriage.<sup>118</sup> But Parsons’s view remained a decidedly minority one among judges throughout the early nineteenth century and into the post-Civil War period. The doctrine of common law marriage was widely adopted by state courts through the 1850s and 1860s, and in 1877 the Supreme Court of the United States recognized and enforced the doctrine in *Meister v. Moore*.<sup>119</sup>

As it turned out, however, the Supreme Court’s imprimatur was a swan song of sorts for common law marriage. During the late nineteenth and early twentieth centuries, robust judicial recognition of common law marriage and underutilization of licensing and registration schemes came under fire from various groups—including marriage moralists and eugenicists—who sought to clarify the distinction between marriage and non-marriage and to strengthen the government’s role in the regulation of marriage, especially with respect to regulating who could marry whom.<sup>120</sup> Notably, the establishment of programs such as workmen’s compensation in the early twentieth century is believed to have added to concerns about the common law marriage doctrine. Cynthia Bowman contends that, “with the growth of new benefits programs, the courts began to add concerns about administrative convenience and fraud in relation to government benefits” to mounting criticism of common law marriage.<sup>121</sup> Whatever the precise causes, the common law marriage doctrine experienced a swift decline in the early twentieth century, as stricter state licensing and registration procedures were in the

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118. *Milford v. Worcester*, 7 Mass. 48, 53 (1810). Justice Parsons’s son, the Dane Professor of Law at Harvard, took a similar view. See PARSONS, *supra* note 101, at 558–61 (discussing the validity of common law marriage). For a discussion of Parsons-the-elder’s and Parsons-the-younger’s views on common law marriage, see GROSSBERG, *supra* note 10, at 71–74.

119. *Meister v. Moore*, 96 U.S. 76, 80 (1877).

120. See GROSSBERG, *supra* note 10, at 86–94 (describing criticism of the common law marriage doctrine); Bowman, *supra* note 110, at 732–40 (describing efforts to abolish common law marriage); see also Part III.C.

121. See Bowman, *supra* note 110, at 746 (“The typical case raising the validity of a common law marriage in the latter part of the twentieth century concerns claims for workers’ compensation or social security benefits, not inheritance.”). Early nineteenth-century pension clerks’ resistance to the common law marriage doctrine shows that administrative convenience and fraud were concerns well before the twentieth century. See *infra* Part II.B–C.

ascendancy.<sup>122</sup> According to Grossberg, such direct regulation of marriage through licensing and registration systems “shifted governance of nuptials away from self-policing [of marriage] toward bureaucratic supervision. . . . The state had become an interested, active third party.”<sup>123</sup>

Although these accounts of the rise and decline of common law marriage differ in important respects, some commonalities are worth highlighting. First, and most obviously, all of these accounts emphasize marriage doctrine’s expansive dimensions in the early nineteenth century. While different authors assign different political valences to this broad conception of marriage, in all of these accounts the emphasis is on marriage as an instrument of legal and social inclusion—sometimes coercive inclusion—rather than exclusion. Second, many of the underlying legal disputes in which the issue of marital status emerged involved private law claims in which a woman sought legitimation of her relationship with a man in order to secure financial support from him or his estate, such as a widow’s claim to inheritance or dower. In this context, marriage operated to secure a private source of support for women. Thus, although the public fisc was not directly at stake, judicial recognition of women’s marital status in these cases protected the polity from having to assume liability for women’s support through, for example, poor relief. Finally, these accounts of the legal regulation of marriage, and particularly the common law marriage doctrine, capture a view of marriage regulation through a specific institutional frame—one focused on the role of courts, or, to use Grossberg’s phrase, the “judicial patriarchy.”<sup>124</sup> It was the judge—simultaneously empowered and constrained by the conventions of his office—who answered the question of “what constitutes marriage.”

### *B. Marriage Law Outside the Courts*

Scant attention has been given to how administrative officials construed marriage law in the early nineteenth century, in part because it is frequently presumed that there was little in the way of centralized administration during this period known for “court and

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122. By the early 1920s, eight states had abolished common law marriage, and ten more states abolished the practice prior to 1960. Bowman, *supra* note 110, at 715 n.24; see also GROSSBERG, *supra* note 10, at 93–102.

123. GROSSBERG, *supra* note 10, at 102.

124. *Id.* at 290 (“Judicial domination was one of the most fundamental realities of nineteenth-century domestic-relations law.”).

parties,”<sup>125</sup> and also because we generally tend to look for the law in judicial opinions. But the administration of military subsidies reveals a parallel world of adjudication of women’s marital status. Over the course of the early nineteenth century, well over fifty thousand women navigated this judgeless branch of the legal world and encountered a very different legal official: the pension clerk. Pension clerks had a different approach to marriage law, and to the women who sought the legal protections of widowhood, than that of their contemporaries on the bench.

In this Section, I show how pension clerks, working to allocate public funds rather than determine private liability, attempted to restrain the relatively unruly approach to the legal construction of marriage used in the courts. Operating largely free of judicial review, these clerks implemented a bureaucratized, “state-centered” definition of marriage that is generally identified with the early twentieth century. First, I describe an alternative adjudicative world in which the forebears of modern administrative law judges determined women’s marital rights in concrete ways. Next, I demonstrate how administrative adjudication of military subsidy claims in the early nineteenth century led to bureaucratic disentitlement as pension clerks stalled, delayed, and denied women’s access to marriage-based entitlements by imposing a legal definition of marriage that many women simply could not satisfy.

### 1. The Judgeless World of Military Subsidy Adjudication

What exactly did this judgeless world of adjudication look like? Depending on when in the early nineteenth century a widow sought a pension, it would have looked more or less like a modern administrative procedure. In the Federalist period, veterans and

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125. Stephen Skowronek has argued famously that the antebellum period was one of “courts and parties,” during which national institutions played an “innocuous role” and “the most fundamental social choices—from the organization of capitalism to the regulation of family life—[were] firmly lodged in state legal codes” administered by state judges. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 23 (1982). Others have challenged aspects of Skowronek’s characterization. See John, *supra* note 23; Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law From Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1574–85 (2008) [hereinafter Mashaw, *Administration*]; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1258 n.3 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1639–47 (2007) [hereinafter Mashaw, *Reluctant Nationalists*]. Writing before Skowronek, Matthew Crenson focused important attention on the development of centralized bureaucracy in the Jacksonian period. MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* (1975).



widows sought financial relief directly from Congress, regardless of whether they sought such relief under a general pension statute or in the hope of a private bill enacted by congressional grace.<sup>126</sup> In 1793 Congress sought to enlist the assistance of Article III federal judges in the adjudication of pension claims, but that plan was famously rejected by federal judges in *Hayburn's Case*.<sup>127</sup> By the early 1800s, unable to saddle federal judges with the work of pension claim review, Congress had all but officially delegated review of pension and land bounty claims to the Department of War, which was to make a preliminary determination of subsidy applications, subject to final congressional approval.<sup>128</sup> In 1833, in response to Secretary of War Lewis Cass's complaint that the Department had assumed a level of responsibility unauthorized by statute, Congress created the Pension Office, housed first within the War Department, and later within the Department of the Interior.<sup>129</sup> It was through the administrative system codified in 1833 that Thankful Reynolds sought a pension in 1837.

Reynolds, like most widows and veterans, did not navigate this system alone. She retained a private pension claims agent. Pension claims agents worked as intermediaries between the applicant and the federal government and were often empowered by the applicant to

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126. See, e.g., 1 AM. STATE PAPERS: CLAIMS 196-97, No. 85 (1797) (report of the Committee on Claims recommending denial of the petition of Anna Welsh, widow of a captain of the Marines); 1 AM. STATE PAPERS: CLAIMS 222, No. 108 (1800) (report by the Committee on Claims recommending denial of the petition of Susannah Fowle, widow of a deceased Army officer). For a general account of Congress's oversight of individual claims against the federal government during the early nineteenth century, see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 643-53 (1985).

127. 2 U.S. (1 Dall.) 409 (1792).

128. See Act of Feb. 28, 1793, ch. 17, § 2, 1 Stat. 324, 325 (ordering that "the Secretary [of War] shall make a statement of the cases of the said [pension] claimants to Congress, with such circumstances and remarks, as may be necessary, in order to enable them to take such order thereon, as they may judge proper"); see also LEONARD D. WHITE, JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861, at 535-36 (1954) (describing the process for review of pension claims by the Secretary of War).

129. LEWIS CASS, LETTER FROM THE SECRETARY OF WAR, RECOMMENDING THE ESTABLISHMENT, BY LAW, OF A BRANCH OF THE WAR DEPARTMENT, TO BE DENOMINATED "THE PENSION OFFICE," H.R. DOC. NO. 22-34 (2d Sess. 1833); see Act of Mar. 2, 1833, ch. 54, 4 Stat. 619, 622 (creating the Pension Office and the Office of the Commissioner of Pensions); Act of Mar. 3, 1849, ch. 108, §§ 1, 6, 9 Stat. 395, 395 (establishing the Department of the Interior and making the Pension Office a bureau of that Department); see also GLASSON, FEDERAL MILITARY PENSIONS, *supra* note 39, at 84-86 (discussing Cass's recommendations to Congress for the creation of a Pension Office within the War Department). Despite its name, once the Pension Office was moved to the Department of the Interior, it was also charged with responsibility for the administration of military bounty lands. See, e.g., LOREN PINCKNEY WALDO, REPORT OF THE COMMISSIONER OF PENSIONS, H.R. EXEC. DOC. NO. 33-1, vol. 1, at 489-90 (1st Sess. 1853) (reporting on bounty lands).

collect the pension payments if the claim was successful.<sup>130</sup> Pension agents tended to live in the vicinity of the widow, not in Washington, D.C.<sup>131</sup> Some were trained as attorneys, but there is nothing to suggest that legal training was required.<sup>132</sup> By advertising their services in newspapers and by soliciting clients, pension claims agents disseminated information about widows' new statutory rights.<sup>133</sup> They then helped women realize those rights by collecting relevant evidence, presenting it to the Pension Office in a manner that complied with the Office's elaborate certification requirements, following up on delayed claims, and sometimes pressing administrative and congressional appeals.<sup>134</sup> Of course, pension claims agents did not assist their clients for free; they generally collected a sizable percentage of the pension as payment for their services. In his 1854 hornbook on pension and bounty land laws, Triplett explained that "[t]he prosecution of these claims has grown into a regular profession, to which many intelligent gentlemen have devoted

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130. See TRIPLETT, *supra* note 43, at v. Pension claims agents should not be confused with pension bank agents. Pension bank agents were appointed by the Secretary of War, through the Pension Office, and acted as the conduit for government payments to the pensioner. See generally JOEL POINSETT, REPORT FROM THE SECRETARY OF WAR, S. DOC. NO. 25-156 (2d Sess. 1838). The majority of bank agents were presidents of local banks, and because their banks derived some benefit from the pension funds provided to them by the U.S. Bank or the Treasury Department, their fees were set at a two percent commission for their services. *Id.* at 3-7; MAYO & MOULTON, *supra* note 42, at 462. In contrast, pension claims agents worked directly with the pension applicants, and were not selected by the government. Claims agents served as advocates for pension applicants throughout the process and generally charged a significant commission for their services. See TRIPLETT, *supra* note 43, at v. Both bank agents and claims agents were implicated in fraud scandals throughout the period. See, e.g., *Frauds Upon the Treasury*, N.H. PATRIOT, Oct. 20, 1834, at 2; *Pension Fraud*, BALT. PATRIOT, Oct. 17, 1834, at 2; *Pension Frauds*, BALT. PATRIOT, Oct. 14, 1834, at 2; *Pension Frauds*, NEWPORT MERCURY, Oct. 18, 1834, at 3.

131. If a widow decided to appeal her claim to Congress, she would sometimes enlist the services of an agent or attorney located in the Capital. See, e.g., File of Sarah Knight, R6030, Roll 1502, Letter from Edmund F. Brown to Hon. Sam[uel] O. Peyton, House of Representatives (Jan. 5, 1845) (letter from pension claims agent concerning status of widow's petition, return address "Washington City, D.C.").

132. Extant subsidy applications, newspaper advertisements, judicial opinions, and congressional debates over regulation of agents do not suggest that pension claims agents were necessarily trained or regulated as lawyers, although some agents clearly were lawyers. For example, part of Abraham Lincoln's very lucrative law practice included representation of veterans and widows to the Pension Office. See Douglas L. Wilson, "Terrific in Denunciation": Taking a New Look at Lincoln the Lawyer, 29 HUMAN. 17, 17 (2008), available at [http://www.neh.gov/news/humanities/2008-01/Lincoln\\_the\\_lawyer.html](http://www.neh.gov/news/humanities/2008-01/Lincoln_the_lawyer.html) (last visited Apr. 7, 2009).

133. See, e.g., *Military Forward March!: Chartered Money—Land and Pensions, for Officers, Soldiers, Widows and Orphans*, AM. TELEGRAPH, July 2, 1817; *Notice*, N.H. SENTINEL, Mar. 30, 1837; *Pension Blanks for Widows*, N.H. PATRIOT, Dec. 26, 1836; *Revolutionary Soldiers—Attend*, E. ARGUS, Apr. 14, 1835; *Soldiers' Claims*, N.H. PATRIOT, Aug. 8, 1850; *To Surviving Widows, Whose Husbands Served in the Revolutionary War*, CONN. COURANT, June 3, 1837.

134. See TRIPLETT, *supra* note 43, at v.

themselves, not without the expectation of a remuneration for their services.”<sup>135</sup> Such remuneration could be handsome. “If the agent be honest and trustworthy, he is satisfied with one-third or one-half of the amount recovered; if he is not, (as is sometimes the case,) he keeps it all.”<sup>136</sup>

Triplett’s characterization of pension claims agents was relatively charitable. While instances of sharp dealing were likely more common, fraudulent conduct by pension claims agents could and, on occasion, did lead to criminal charges against individual agents, and to stricter regulation of agents by Congress.<sup>137</sup> One congressional report described claims agents as “a class of persons . . . who hang like parasites upon [society’s] industry, and tend, by their daily practices, to poison the very sources of its prosperity.”<sup>138</sup> Despite misgivings about their functions and fees, pension claims agents played a central role in the administration of military subsidies—a role that continued through the period because of the complexity of the administrative system that emerged to process veterans’ and widows’ claims.

After amassing the voluminous documentation required to support a widow’s claim, the pension claims agent sent the application to the Pension Office in Washington, D.C., where pension clerks reviewed the applications and made initial determinations of eligibility. Although War Department clerks in the informally created Pension Office processed pension applications from at least the 1810s, the position of pension clerk was officially recognized and salaried in 1833, when Congress created the Pension Office and appropriated money for the clerks’ salaries.<sup>139</sup> The salaries, which in 1843 ranged from \$800 to \$1,400 per year, made them fairly well paid white-collar workers for the period.<sup>140</sup> In any particular year, the Pension Office

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135. *Id.*

136. *Id.*

137. See, e.g., Act of Mar. 3, 1825, ch. 65, § 18, 4 Stat. 115, 120 (criminalizing forgery of letters of attorney and false impersonation associated with pension applications); *United States v. Staats*, 49 U.S. (8 How.) 41, 43–44 (1850) (describing criminal charges against pension agents for commission of fraud upon the government); *United States v. Wilcox*, 28 F. Cas. 597, 598–99 (N.D.N.Y. 1859) (No. 16,691) (concerning transmission of forged documents to the Pension Office); *United States v. Waterborough*, 28 F. Cas. 417, 418–19 (D. Me. 1841) (No. 16,648) (describing an action for pension fraud); COMM. ON REVOLUTIONARY PENSIONS, FRAUDS ON PENSION OFFICE, H.R. REP. NO. 23-37 (2d Sess. 1835) (describing instances of pension fraud).

138. SOLON BORLAND, REPORT OF THE SELECT COMMITTEE ON ABUSES, BRIBERY, OR FRAUD IN THE PROSECUTION OF CLAIMS BEFORE CONGRESS, S. REP. NO. 33-1, vol. 1, at 29 (Spec. Sess. 1853).

139. Act of Mar. 2, 1833, ch. 54, 4 Stat. 619, 622.

140. LETTER FROM THE SECRETARY OF WAR, TRANSMITTING THE NUMBER, CLASSES, AND COMPENSATION OF PERSONS EMPLOYED IN THE OFFICE OF THE SECRETARY OF WAR ON THE 1ST OF JANUARY, 1829, AND ON THE 1ST OF JANUARY, 1843, WITH THE COMPENSATION OF EACH AT THE

employed anywhere from six to eighty-five pension clerks, including a Chief Pension Clerk.<sup>141</sup> A review of randomly selected applications to the War Department for employment as clerks suggests that the pension clerks were generally drawn from a pool of educated men but were not likely to have been trained as lawyers. For example, Lewis Bixby, a resident of Rochester, New York, sought a clerk position in 1845. His letters of recommendation tell us that he was a graduate of Union College, a school teacher, and an active Democrat.<sup>142</sup> Pension clerks were, in other words, men who prior to becoming clerks relied heavily on connections and general proficiency, rather than special training or expertise, to achieve professional status.

As suggested in an 1832 report to Congress by Secretary Cass, once they assumed the job of pension clerk, these administrators had little, if any, autonomy in their offices. Cass described the pension clerks as men “who, from their experience, or other qualifications, are fully competent to the discharge of this duty, and who act under the more immediate direction of the faithful officer who has so long presided over the Pension Bureau.”<sup>143</sup> The “faithful officer” in question was James Edwards, who worked in the Pension Office starting in the 1810s—before the Office was officially recognized under law—and was

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RESPECTIVE PERIODS, H.R. DOC. 27-209, at 11 (3d Sess. 1843); *see also* ROBERT A. MARGO, *WAGES AND LABOR MARKETS IN THE UNITED STATES, 1820–1860*, at tab. 3A.7 (2000) (estimating the average nominal monthly wages for white-collar workers in the South Atlantic region to be \$42.69 per month for the period 1841–1850).

141. *See, e.g.*, LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING LISTS OF CLERKS AND OTHER PERSONS EMPLOYED IN THAT DEPARTMENT, H.R. DOC. 31-54, at 10–13 (2d Sess. 1851); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING LISTS OF THE NAMES OF THE CLERKS EMPLOYED IN THE WAR DEPARTMENT, IN THE LAST YEAR, AND THE COMPENSATION ALLOWED TO EACH, H.R. DOC. 15-106, at 22 (2d Sess. 1819).

142. Application of Lewis Bixby, NARA, Register of Applications for Regular Army Commissions and Civilian Appointments, RG 107, Entry No. 258, Box No. 1; *see also, e.g.*, Application of Daniel Boyd, NARA, Register of Applications for Regular Army Commissions and Civilian Appointments, RG 107, Entry No. 258, Box No. 1, Letter from William S. Amble to Hon. Lewis Cass (Oct. 27, 1832) (describing clerk applicant as a former merchant); Application of William H. Boswell, NARA, Register of Applications for Regular Army Commissions and Civilian Appointments, RG 107, Entry No. 258, Box No. 1, Letter from William H. Boswell to Hon. John H. Eaton (Mar. 16, 1829) (explaining that applicant is by training a printer); Application of Peter C. Bowne, NARA, Register of Applications for Regular Army Commissions and Civilian Appointments, RG 107, Entry No. 258, Box No. 1, Letter from H.[V.L.] Van der Beys to Sec’y of War (n.d.) (“I assure you upon my honor that Mr. B — is an accomplished young gentleman, and would honor any office to which young men are eligible . . .”). It is possible that certain clerks were trained attorneys. For example, Francis Triplett, a Chief Clerk during the 1840s, appears to have been an attorney. After his tenure as Chief Clerk he became a pension and land bounty claims agent and in that capacity represented widows and veterans in the Claims Court. *See, e.g.*, *Ansart’s Heirs v. United States*, 6 U.S. Cong. Rep. C.C. 165 (Ct. Cl. 1858) (noting F.F.C. Triplett as attorney for heirs of a veteran).

143. LEWIS CASS, REPORT OF THE SECRETARY OF WAR, H.R. DOC. NO. 22-2, at 31 (2d Sess. 1832).

selected in 1818 by Secretary of War John Calhoun to run the Pension Office in the wake of a major pension fraud scandal.<sup>144</sup> In 1833, when the Pension Office was codified by statute, Edwards was appointed as Commissioner, a position he held until 1850.<sup>145</sup>

Commissioner Edwards appears to have had a heavy hand in virtually every aspect of the Office's business. Widows' military subsidy applications and other sources reveal that Edwards was regularly involved in deciding individual widows' claims, either as a first reviewer or as an informal appellate adjudicator when an applicant was dissatisfied with an initial result.<sup>146</sup> In addition to overseeing individual adjudications, Edwards also established Office policies regarding eligibility criteria, including criteria that would determine the validity of a widow's marriage.<sup>147</sup> These criteria were memorialized in the forms, circulars, and manuals that guided the everyday business of the individual pension clerks.<sup>148</sup>

Edwards not only directed the decisionmaking processes of the Pension Office, but also protected the clerks from Congress's frugality and, presumably, the rotation system. Starting in 1842, in virtually every annual report from the Department of War to Congress concerning the Departments' employees, Edwards included a letter proclaiming the ongoing utility of the clerks:

The clerks in this office have all been, and are still, usefully employed; and I cannot dispense with the services of any one of them at present without detriment to the public

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144. RESCH, *supra* note 22, at 124–25.

145. Perhaps because of a general respect for Edwards's integrity, Edwards escaped Andrew Jackson's famed "rotation system." For a discussion of the rotation system and its impact on the civil service, see CRENSON, *supra* note 125, at 48–71; see also Mashaw, *Administration*, *supra* note 125, at 1613–28 (describing the rotation system); discussion *infra* note 246.

146. See, e.g., File of Patsy Bass, W23482, Roll 169, Letter from J. Ewing, Dep't of Interior, to J.L. Edwards, Comm'r of Pensions (June 27, 1850) (affirming Pension Office determination in individual widow's case); File of Thankful Reynolds, W11118, Roll 2026, Letter from J.L. Edwards to Hon. J.C. Bates (Dec. 28, 1841) (urging against congressional reversal of Pension Office's denial of widow's pension application).

147. See *infra* Part II.C. At least in theory, Edwards set Pension Office policies in conformity with the policies and interpretations provided by the Secretary of War, the Secretary of Interior, the Attorney General, and Congress. See MAYO & MOULTON, *supra* note 42, at lxii (observing that an 1815 opinion by Secretary of War Dallace endorsed the principle that "[t]he opinion of the Attorney General is to govern in all applications for pensions," but noting that such opinions are now "advisory only, yet they are as scrupulously conformed to, as the law itself"). However, as I demonstrate below, Edwards did not always adhere to his superiors' policy directives in practice.

148. See, e.g., MAYO & MOULTON, *supra* note 42, at 601–702 (reproducing REGULATIONS, FORMS, AND INSTRUCTIONS BY SECRETARIES OF WAR, NAVY, TREASURY, INTERIOR, AND THE COMMISSIONER OF PENSIONS, IN THE EXECUTION OF THE PENSION LAWS AND LAND BOUNTY LAWS); see also sources cited *infra* note 220.

service. I do not think that the removal of any one of them is necessary, or that any other change is required for the better dispatch of business.<sup>149</sup>

In short, the world that widows navigated in pursuit of a military subsidy was a bureaucratic hierarchy overseen by a particularly powerful Commissioner.

Eligibility determinations by the Pension Office were not subject to judicial review as we understand that concept today.<sup>150</sup> But that did not mean the disappointed widow had no recourse. If an individual widow's claim was rejected by the Pension Office, she could first appeal to the Secretary of War or the Interior, and finally to Congress.<sup>151</sup> An 1846 opinion of the Attorney General is especially

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149. LETTER FROM THE SECRETARY OF WAR, TRANSMITTING A LIST OF CLERKS AND ALL OTHER PERSONS EMPLOYED IN THE WAR DEPARTMENT DURING THE YEAR 1842, H.R. DOC. 27-117, at 8 (3d Sess. 1843); *see also* LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING A LIST OF CLERKS AND OTHERS EMPLOYED IN HIS DEPARTMENT, H.R. EXEC. DOC. 31-79, at 21 (1st Sess. 1850); REPORT OF THE SECRETARY OF WAR, OF THE NAMES OF THE CLERKS AND OTHER PERSONS EMPLOYED IN THE BRANCHES OF THE WAR DEPARTMENT, EXCEPT OFFICERS OF THE ARMY, DURING THE YEAR 1848, S. EXEC. DOC. 30-11, vol. 1, at 13 (2d Sess. 1849); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING A STATEMENT SHOWING THE NAMES OF THE CLERKS AND OTHER PERSONS EMPLOYED IN ALL THE BRANCHES OF THAT DEPARTMENT, H.R. DOC. 29-40, at 4 (2d Sess. 1847); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING A STATEMENT SHOWING THE NAMES OF THE CLERKS AND OTHER PERSONS EMPLOYED IN ALL THE BRANCHES OF THAT DEPARTMENT, H.R. DOC. 29-56, at 19 (1st Sess. 1846); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING STATEMENTS OF NAMES OF CLERKS AND OTHER PERSONS EMPLOYED IN THAT DEPARTMENT DURING THE YEAR 1844, H.R. DOC. 28-37, at 3 (2d Sess. 1845); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING REPORT AND STATEMENTS, SHOWING THE NUMBER OF CLERKS AND OTHER PERSONS EMPLOYED IN THAT DEPARTMENT DURING THE YEAR 1843, H.R. DOC. 28-48, at 4 (1st Sess. 1844).

150. According to Jerry Mashaw, judicial review in the Jacksonian era was "as confused and conflicted as the political history of the period. The Court redeemed Marshall's promise of mandamus review in *Marbury v. Madison* and then immediately limited it to an almost vanishing category of purely ministerial actions." Mashaw, *Administration*, *supra* note 125, at 1683. Additionally, under certain circumstances, individuals aggrieved by a federal administrator's conduct could pursue common law damages actions in state court. *See id.* at 1669-84 (describing judicial review of administrative action during the Jacksonian period); Mashaw, *Reluctant Nationalists*, *supra* note 125, at 1674-96, 1725-36 (describing judicial review of embargo and public land claims in the Republican era). As a practical matter, however, judicial review of claims denials by the Pension Office was almost nonexistent. I have located only one such action brought by a widow, and that was the case of Susan Decatur, widow of the famous commodore Stephen Decatur. Decatur's case was unusual in many respects, including the fact that she sought a writ of mandamus to force the Secretary of the Navy to pay her a pension. Her pursuit of a writ of mandamus failed. *See Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 523 (1840). For sustained discussions of Susan Decatur's case, *see* Mashaw, *Administration*, *supra* note 125, at 1673-77; Collins, *supra* note 49, at 22-27. It was not until 1855 that Congress created the Court of Claims to review certain kinds of claims against the federal government, but even then Congress retained ultimate authority over all claims upon the public treasury, including individual pension claims. Act of Feb. 24, 1855, ch. 122, § 9, 10 Stat. 612, 618-19; Shimomura, *supra* note 126, at 652-53.

151. 4 Op. Att'y Gen. 515 (1846) (describing the appeal process and opining that the President lacked the power to correct errors of the Pension Office); *see also* File of Patsy Bass, W23482, Roll 169, Letter from J.E. Heath, Comm'r of Pensions, to A.H.H. Stuart, Sec'y of the Interior (Dec. 3, 1850) (reporting an appeal from an adverse decision of the Commissioner of

instructive in this regard. The question posed to the Attorney General was whether a widow had a right "to an appeal to the President from a decision of the Commissioner of Pensions, which had been approved by the Secretary of War."<sup>152</sup> The answer was clear: disgruntled pension applicants "can apply for relief to Congress, whose power cannot be doubted."<sup>153</sup> Apparently, the widow had not raised the possibility that the Pension Office's decision could be appealed to a court of law, nor did the Attorney General see fit to preempt such an argument—an omission that suggests courts of law played an extremely tangential role in the review of military subsidy claims.

In the absence of meaningful judicial review, women's navigation of the military subsidy system is truly an example of the law's life outside the courts, and, more specifically, of family law's life outside the courts. Judges were not the only legal officials entrusted with establishing the legal metes and bounds of marriage in this period. With the creation of broad-scale marriage-based entitlements in the early nineteenth century, this administrative world—peopled by pension agents, pension clerks, and a very powerful Commissioner—became a site of contest concerning the legal definition of marriage. For the woman seeking a marriage-based entitlement, it was the distant bureaucrat in Washington, not "judicial patriarchs" in black robes, who would make a legal determination of whether she had been legally married to her husband.

## 2. Widows, Pension Clerks, and Proving Marriage

When seeking a military subsidy through this relatively complex administrative process, a widow was required to submit proof of her husband's service in the military and of the legality of her marriage. Many women had problems producing proof of either kind, but satisfying the pension clerks' standards for proof of marriage posed particular difficulties for widows. As was sensible at a time when marriage licensing and registration procedures were underutilized, statutory and administrative rules promulgated during the period required the Pension Office to recognize common law marriage and to take a generous view of what constituted a legal

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Pensions to the Secretary of the Interior); *id.*, Letter from J. Ewing, Dep't of Interior, to J.L. Edwards, Comm'r of Pensions (June 27, 1850) (affirming Pension Office determination); File of Joanna Brown, W8386, Roll 359, Pet. of Joanna Brown for a Pension Under the Act of 4th July 1836 to the Comm. on Revolutionary Pensions (Jan. 18, 1849) (appealing to Congress by petition after her pension claim was rejected by the Pension Office).

152. 4 Op. Att'y Gen. 515, 515 (1846).

153. *Id.* at 518.

marriage.<sup>154</sup> Thus, under applicable statutes and regulations, pension clerks were supposed to evaluate claims to marital status using the same liberal standards as judges of the period. In practice, however, women who had not used municipal schemes to license and register their marriages faced significant, often insurmountable administrative resistance to the recognition of their marriages.<sup>155</sup>

One pension agent's letter to the Pension Office provides an entrée into the pension clerks' resistance to women's assertions of marital status. The agent, frustrated by the pension clerks' refusal to accept the evidence that he had gathered to prove Catharine Baer's marriage, challenged the Pension Office's failure to follow the standards used in courts of law:

In *Feuder v. Bower* . . . it is held that for civil purposes that reputation and cohabitation are sufficient evidence of marriage. . . . Indeed decisions of similar authority can be found[,] as you are no doubt aware, in the judicial records of every state wherever the question has come up — In the absence of other evidence is the War Department governed by the rules in force before judicial tribunals?<sup>156</sup>

This agent's letter raised an issue that dogged many women seeking military subsidies. Careful examination of hundreds of widows' pension and land bounty applications suggests that proving marital status was a Herculean task.

Pension clerks' overwhelming preference for registered marriages was manifest by their insistence that a widow provide record evidence of her marriage to a soldier or veteran if such evidence was available. As explained in Pension Office instructions for applicants: "The legality of the marriage . . . must be clearly established. Record proof, as to the marriage, is always required whenever it can be obtained."<sup>157</sup> In theory, this seems like a reasonable standard. If a widow possessed formal record proof of her marriage, she was required to provide it. However, in the actual implementation of the rule, Pension Office administrators seemed to equate record evidence with legal marriage.

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154. See *infra* text accompanying notes 230–33.

155. See, e.g., File of Eve Awalt, W326, Roll 97, Letter from John Bruce to J.L. Edwards (Dec. 22, 1845) (inquiring as to status of delayed pension claim of widow who could not provide record evidence of marriage); File of Angelica Bond, R997, Roll 284, Letter from G.F. Yates to J.L. Edwards, Comm'r of Pensions (Jan. 18, 1843) (inquiring as to status of delayed pension claim of widow who could not provide record evidence of marriage and explaining that "there are quite a number of pension applications forwarded by me many years since").

156. File of Catharine Baer, R364, Roll 106, Letter from J.M. Boughner to Hon. J.L. Edwards (Oct. 23, 1849).

157. *Rules of Evidence in Widows' and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, H.R. DOC. NO. 25-118, at 103 (2d Sess. 1838); see also MAYO & MOULTON, *supra* note 42, at 616; TRIPLETT, *supra* note 43, at 35.



Even those widows who could produce official record evidence of their marriages faced searching scrutiny by administrators if their submission at all deviated from the expected form of such records. For example, in her application for a pension, Mary Asbury provided a copy of a 1785 letter signed by her father authorizing the filing of a marriage license and a copy of a marriage bond of the same date, both of which had been filed with the county clerk.<sup>158</sup> Copies of both documents were accompanied by a sealed certification by the county clerk declaring that the actual documents were on file in his office.<sup>159</sup> One might expect that the Pension Office would consider these official records to be adequate evidence of the couple's marital status. But the Pension Office was unconvinced, and required additional evidence, including a statement as to whether or not the marriage had been otherwise recorded.<sup>160</sup>

Susanna Angell found herself similarly embattled with the Pension Office when she submitted an original certificate of marriage provided by the officiant of her marriage.<sup>161</sup> The Office rejected her application on the ground that such evidence was implicitly called into question by an affidavit from the town clerk stating that there was no record of the marriage on file.<sup>162</sup> Incensed by the Pension Office's legalism and refusal to recognize the certificate, the agent fumed that "[t]here is no further nor can there be any better evidence than the original certificate of marriage . . . ."<sup>163</sup>

Even a state court record certifying the legality of a marriage for other purposes, such as probate, was not necessarily sufficient evidence of marriage as far as the Pension Office was concerned. Rachel Anderson's pension agent complained when the Pension Office refused to accept a probate court's certification of Rachel's status as a widow:

You say . . . that it will be necessary for Mrs. Rachel Anderson to prove by two credible witnesses [before a court of record] that she is a widow & c. all of which was proven to the satisfaction of the Probate Court which is now of record. . . . [B]ut if such proof as was sufficient 3 or 4 weeks ago will [it] not do now[?] [T]he old lady will send on the

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158. File of Mary Asbury, W5644, Roll 81, Certified Reproductions of Marriage Bond and Letter dated May 24, 1785 (Nov. 9, 1843).

159. *Id.*

160. *Id.*, Decl. of Sally Patterson Sale (Aug. 21, 1844); *id.*, Decl. of Henry Hatcher (Aug. 20, 1844).

161. File of Susanna Angell, W1353, Roll 66, Decl. of Susanna Angell (Mar. 3, 1853).

162. *Id.*; *id.*, Decl. of Raymond G. H[aus], Town Clerk (Aug. 4, 1853); *id.*, Letter from B[enjamin] Cowell to Hon. L.P. Waldo (Aug. 13, 1853).

163. *Id.*, Letter from B[enjamin] Cowell to Hon. L.P. Waldo (Aug. 13, 1853).

proof required although it will cost her about as much as she will get when it is allowed.<sup>164</sup>

For many women, administrators' searching scrutiny of official record evidence was of little moment, as no such contemporaneous documentation had been made. Nevertheless, pension clerks' preference for official record evidence of marriage was so overwhelming that widows were required to provide a certified statement as to the *absence* of official record evidence. Therefore, widows who could not produce official record evidence of their marriages had to provide a declaration, preferably from the town clerk, certifying that the records of the town had been searched and no such record existed. As advised by Mayo and Moulton in their guide to the pension and bounty land laws:

The [widow's] declaration must be accompanied by *satisfactory proof of the marriage* . . . . If married in any State or county where any public records of marriages are kept, the marriage should be proved by a duly certified copy of the record . . . . If it is shown, by affidavit, *that no record evidence or testimony of eye-witnesses can be procured*, the claimant may then produce the best other evidence in her power . . . .<sup>165</sup>

One Massachusetts newspaper went so far as to publish the dates during which marriages were routinely recorded in the state, presumably in an effort to make a public record of the futility of searching for marriage records.<sup>166</sup> However, public proclamation of the unavailability of a licensing and registration system was inadequate as far as the Pension Office was concerned, as confirmed by individual widows' experiences.<sup>167</sup> Rachel Atwood's application was initially rejected because "it must be shown by the certificate of the resident clergyman, and the town clerk of the town where it took place, what

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164. File of Rachel Anderson, W513, Roll 56, Letter from A.G. Matthews to Comm'r of Pensions (Aug. 24, 1853).

165. MAYO & MOULTON, *supra* note 42, at 662 n.\*; *see also id.* at 671 n.\*; Letter from Pension Office to Ness[in], Kain & Jones (Sept. 21, 1853), NARA, Records of the Dep't of Veterans' Affairs, RG 15, NN No. 22, Entry No. 1, Original & General Corresp. of the Pension Office, Letters Sent, vol. 434 (letter advising representatives of widows that the widow "must establish her marriage by public or private record or show that evidence of that grade does not exist").

166. *For the Sun.: Records of Marriages in Massachusetts*, PITTSFIELD SUN (Mass.), Mar. 16, 1837.

167. *See, e.g.*, File of Susan Ashburn, W5649, Roll 81, Decl. of Robert J. Dunaway, Clerk of the County Clerk of Lancaster County, Virginia (n.d.) (certifying "that there are no lists of marriage recorded in this Court previous to the 21st day of July 1793 . . . and that such lists were not so recorded generally till the year 1794"); File of Love Butler, R1547, Roll 436, Decl. of Isaiah D. Pease, Clerk of Town of Edgartown, Mass. (Aug. 20, 1839) (certifying that he searched the record of marriage for Love Butler and "cannot find any such marriage on record," and further explaining that "the Records are not so regular and full as to raise a presumption against the validity of a Marriage not recorded therein"); File of Catharine Baer, R364, Roll 106 (pension agent and Pension Office engaged in prolonged correspondence regarding the sufficiency of evidence of widow's marriage even after proving absence of record evidence).

evidence, if any, is to be found there, before parole evidence on that point could be received.”<sup>168</sup>

Friends of widows and pension agents enlisted to help usher subsidy applications through the Byzantine application process complained bitterly about pension clerks’ focus on official records to establish the legality of a marriage, frequently drawing attention to the significant disparity between the standards employed by courts and those used by administrators in the Pension Office. In the application of Bethiah Bagnell, the pension agent explained to the Pension Office that record evidence was unavailable for Massachusetts marriages performed prior to 1786 and, quoting an 1813 Massachusetts Supreme Court opinion, asserted that “a copy of such record is not so satisfactory evidence [of marriage] as the testimony of witnesses.”<sup>169</sup> Likewise, the pension agent for Elizabeth Bemensderfer complained that the Pension Office’s request for record evidence was inappropriate because “in Pennsylvania, proof of that kind is not necessary to establish a marriage—Common reputation & cohabitation as man & wife, are sufficient under our laws.”<sup>170</sup> In response to an inquiry sent by the Department of the Navy, a lawyer for one widow assured the Department that “there never was any certificate of the marriage aforesaid in existence,” and that such documents are “not considered as any evidence of the fact of marriage by the courts of law in the state of New York, and are for all local purposes of a legal character wholly useless.”<sup>171</sup> Instead, he explained,

[T]he evidence of marriage required and admitted in all cases of a merely civil nature in the courts of the state of New York is either the oath of some person who saw the parties married, or proof or oath that the parties lived together as man & wife, treated each other as such, cohabited and were generally reputed and believed to be, and that either mode of proof may be adopted as the party may think proper.<sup>172</sup>

These agents’ and lawyers’ characterizations of different state law standards were indeed accurate, but this did not stop the Pension Office from continuing to demand official records.

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168. File of Rachel Atwood, W17222, Roll 89, Letter from Elias Holliday to James L. Edwards, Comm’r of Pensions (June 7, 1839).

169. File of Bethiah Bagnell, W2578, Roll 106, Letter from William Thomas to James L. Edwards, Comm’r of Pensions (Aug. 24, 1836) (quoting *Commonwealth v. Norcross*, 9 Mass. 492 (1813)).

170. File of Elizabeth Bemensderfer, R736, Roll 209, Letter from Edward P. Pearson to J.L. Edwards (Apr. 20, 1839).

171. File of Dorothea Cooper, NARA, Records of the Dep’t of Veterans’ Affairs, RG 15, Old Wars Pension Files, Widow’s File 272, Decl. of Daniel Robert (June 8, 1819) (emphasis added).

172. *Id.*

In the absence of official records, the Pension Office demanded unofficial record evidence. Church registers, declarations from clergy, family bibles, and even hand-stitched “samplers” and illustrated keepsakes evidencing family history were all submitted to support claims of marriage, becoming part of the legal record.<sup>173</sup> Many widows lacked even such unofficial record evidence, however, either because no such unofficial record had been made, or because it had been lost or was otherwise unavailable.<sup>174</sup> In any case, although production of unofficial record evidence of a ceremony helped a widow’s claim, such evidence was decidedly second best as compared with official record evidence and was therefore subject to probing review. Pension clerks carefully scrutinized records from churches and declarations by ministers or other officiants. According to Mayo and Moulton, “A certificate from the clergyman or magistrate who solemnized the marriage is not competent evidence, unless the genuineness of the certificate be proved, and the person who gave it be shown to have been authorized to solemnize marriages.”<sup>175</sup>

Angelica Bond’s experience confirms this practice. Angelica was married to Richard Bond by an itinerant preacher and thus had much explaining to do when she sought a pension under the Act of July 4, 1836.<sup>176</sup> Her pension agent explained to the Pension Office that the minister who married the couple “was an itinerant preacher employed to preach for a length of time in that vicinity, but no regular church or society, was, or has since been formed from the Congregation to whom he preached; consequent[ly] no records are in existence.”<sup>177</sup> Five years after she submitted her application, Angelica was dead and her claim was still pending.<sup>178</sup>

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173. See Jennifer Davis Heaps, “Remember Me”: *Six Samplers in the National Archives*, 34 PROLOGUE 52 (2002). Family events were also recorded in intricately illustrated booklets. Constance B. Schultz, *Daughters of Liberty: The History of Women in the Revolutionary War Records*, 16 PROLOGUE 142 (1984).

174. See, e.g., File of Catharine Baer, R364, Roll 106, Letter from J.M. Boughner to Pension Office (Nov. 24, 1849) (explaining that the applicant lacked a family record of the marriage and births of the children because the record was taken by a person purporting to be a pension agent); File of Sarah Knight, R6030, Roll 1502, Decl. of Sarah Knight (Feb. 18, 1847) (explaining that all of the family papers, including the family Bible, were destroyed in a fire).

175. MAYO & MOULTON, *supra* note 42, at 662 n.\*; see also *id.* at 672 n.\*; File of Mary Burgharett, W21730, Roll 413, Letter from W[illiam] B. Pierce to Hon. J.L. Edwards (Feb. 13, 1845); *id.*, Letter from J.L. Edwards, Comm’r of Pensions, to W.B. Pierce (Nov. 22, 1844); File of Mary Bowers, W23646, Roll 302, Decl. of Mary Bowers (Aug. 13, 1838).

176. File of Angelica Bond, R997, Roll 284, Letter from G.F. Yates to J.L. Edwards, Comm’r of Pensions (Aug. 12, 1841); *id.*, Decl. of Nancy Bond (Jan. 5, 1838).

177. *Id.*

178. *Id.*, Letter from G.F. Yates to J.L. Edwards, Comm’r of Pensions (Jan. 18, 1843).

This level of scrutiny was not reserved for church records. So discerning was the Pension Office's review of family records, another form of unofficial record evidence, that pension clerks required production of the "original record," which had to be "sworn to by the person in whose possession it has been kept."<sup>179</sup> William Archer's experience is illustrative. On behalf of his mother, Jane Archer, William first submitted a transcription of a family Bible recording his parents' marriage, declaring that the copy "from the said family record is a true copy."<sup>180</sup> That did not satisfy the Pension Office, so William then submitted the actual page from the family Bible, with a full explanation of its provenance:

[T]he sheet or leaf of paper hereto annexed below and marked A at the head thereof is . . . part of the family record of Zachariah Archer, now deceased, and Jane Archer, his wife, that said leaf or sheet of paper was cut by this affiant out of the family Bible of the said Zachariah and Jane Archer on this day; that said Bible & Record is yet remaining in the possession of the remaining part of the family of the said Zachariah & Jane Archer of which this affiant is a member.<sup>181</sup>

After production of a page torn from the family Bible, and certification of its origin, Jane Archer's application was granted.

Those widows who lacked either official or unofficial record evidence of their marriages were left to rely on the good word of the community to support their claims to marital status. But reputation evidence, a hallmark of legal marriage under the common law marriage doctrine, was by far the weakest form of evidence as far as the Pension Office was concerned. Certainly, administrative officials did not "presume marriage," as was the tendency in courts of law.<sup>182</sup> Friends, family members, neighbors, and adult children filed declarations of their recollections of the couple's reputed marital status, a ceremony, or other factual details relevant to the widow's marital status, but the veracity of such declarations was constantly called into question. Simple statements as to the couple's marital relationship or the woman's status as a widow were not sufficient: "In no case," Mayo and Moulton tell their readers, "will the mere statement of the witnesses, that the claimant *is the widow* of the deceased, be taken as evidence of the marriage; but the witnesses must state the facts and circumstances from which they derive their knowledge or opinion that she is the widow of the deceased."<sup>183</sup>

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179. TRIPLETT, *supra* note 43, at 35.

180. File of Jane Archer, W23462, Roll 72, Decl. of William B. Archer (Oct. 18, 1841).

181. *Id.*, Decl. of William B. Archer (Nov. 11, 1841).

182. See *supra* Part II.A.

183. MAYO & MOULTON, *supra* note 42, at 662 n.\*; see also *id.* at 672 n.\*.

Moreover, all reputation evidence of marital status required at least two levels of official verification. First, the declarant had to obtain certification from a magistrate or judge, in which he testified as to the declarant's identity and good standing in the community.<sup>184</sup> In turn, a town or county clerk was required to add another certification confirming that, in fact, the magistrate was who he claimed to be.<sup>185</sup> Thus, layer upon layer of community testimony was required to vouch for each fact asserted. Even then, and despite the Office's stated policy of accepting reputation evidence of marriage, the Pension Office frequently rejected such evidence as proof of marriage. An 1849 letter from Commissioner Edwards to Catharine Baer's pension agent exemplifies the Pension Office's stance toward reputation evidence: "If there be no Church, Parish, or Family register of the marriage, and there be a register of the births of the children made at or about the time of their births it should be produced. Proof of cohabitation as man and wife for fifty years back is not sufficient."<sup>186</sup> Sarah Knight's experience corroborates this quasi-official policy of refusing to accept reputation evidence. According to no fewer than nine certified declarations submitted to the Pension Office, Sarah had been the wife of John Knight.<sup>187</sup> Nevertheless, the Pension Office denied her application and she died pensionless after eight years of pursuing her claim.<sup>188</sup>

Pension clerks' skepticism of marriages proven by reputation evidence potentially affected all women, but it may have particularly

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184. See, e.g., *Regulations and Forms for Widows and Orphans' Pensions, Under the Act of Feb. 3, 1853*, reprinted in MAYO & MOULTON, *supra* note 42, at 757 (explaining that an applicant must make a declaration "before some magistrate in the county where the declarant resides . . . . The official character of the magistrate must be duly certified by the proper officer under his seal of office, and the magistrate . . . must certify that the declarant is personally known to him").

185. See *id.*; see also *Rules of Evidence in Widows' and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, H.R. DOC. NO. 25-118, at 103 (2d Sess. 1838) (requiring certification that person certifying declaration was, in fact, a judicial officer).

186. See File of Catharine Baer, R364, Roll 106, Letter from J.L. Edwards to J.M. Boughner (Oct. 27, 1849).

187. See File of Sarah Knight, R6030, Roll 1502, Decl. of F.P. Pennington (Sept. 9 1842); *id.*, Decl. of Joseph Newton (Sept. 9, 1842); *id.*, Decl. of William Crabtree (Sept. 9, 1842); *id.*, Decl. of Jesse F[ox] (Oct. 5, 1842); *id.*, Decl. of Jacob Oglesby, William Oglesby, and James Harkin[sen] (Dec. 25, 1845); *id.*, Decl. of Jonathan Clark (Jan. 22, 1846); *id.*, Decl. of Jacob Ogelsby, Elizabeth Fox, and John Knight (Feb. 18, 1847); *id.*, Decl. of Lewis D. Scarlet (Aug. 14, 1849); *id.*, Decl. of James Knight (Sept. 17, 1849).

188. Sarah Knight initiated her claim no later than 1842. *Id.*, Decl. of Sarah Knight (Sept. 9, 1842). The last notation in her application file is dated 1850. *Id.*, Pet. of Sarah Knight (clerk's notation dated 1850). In June of 1852, Jesse Fox, likely Sarah's son-in-law, filed a power of attorney declaration in her case, thus suggesting that her heirs were pursuing payment of pension arrears. *Id.*, Decl. of Jesse Fox and Elizabeth Fox (June 14, 1852). Accordingly, it appears that Sarah died between 1850 and 1852.

disadvantaged women who were less likely to have had the means to hold a ceremony or pay a registration fee. Elizabeth Barker's experience serves as a case in point.<sup>189</sup> She could provide no documentary evidence of her marriage "near the close of the Revolutionary War" to Edward Barker, a private in that war.<sup>190</sup> In a letter to the Pension Office, her pension agent, John Stevens, complained at length about the Office's demand for record proof of marriage and witnesses to events that had taken place at least fifty years earlier, in part because widows who sought the benefit of the pension laws generally came from society's lower ranks:

It is well known, in our struggle for a National Existence, the Ranks of Our Army was principally composed of men from the Humble walks of life, they more poor, without Education, but rich, with a noble and constant patriotism and love of Country. . . . [A]nd is it at all surprising, after the lapse of a half century, Mrs Barker should be unable to prove by living Witnesses, her marriage to Edward Barker.<sup>191</sup>

Notwithstanding these appeals to the national conscience, and despite the fact that Elizabeth had provided two declarations reporting that she and her husband, Edward, "passed as man and wife, and always lived together as such,"<sup>192</sup> her application for a pension under an 1848 pension statute was denied.

Administrative skepticism of reputation evidence may have also particularly disadvantaged the relatively few women of color who applied for military subsidies.<sup>193</sup> Pursuant to Pension Office policy, African-American widows and other non-white widows were not barred from collecting military subsidies.<sup>194</sup> However, it may have

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189. File of Elizabeth Barker, R496, Roll 141, Letter from John W. Stevens to Pension Office (May 9, 1853).

190. *Id.*, Decl. of Elizabeth Barker (May 23, 1848).

191. *Id.*

192. *Id.*, Decl. of John Clark (May 23, 1848); *see also id.*, Decl. of John Price (May 23, 1848).

193. I do not undertake a more extensive examination of the role of race in the widows' military subsidy system in this Article, largely because of the very small number of African-American widows' subsidy applications in my randomly selected sample. Relatively few African-Americans served in the military during this period, and therefore, given extant legal and cultural limitations on interracial marriage, relatively few widows of color seem to have applied for subsidies. *See* BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION*, at ix (1961) (estimating that 5000 black men served in the patriot forces). Lori Finklestein examines the rhetorical conventions of African-American Revolutionary War widows' pension applications, finding a disproportionate emphasis on their work ethic as a basis for their worthiness. *See* Finklestein, *supra* note 22, ch. 5. As others have demonstrated, race played a central part in the creation and administration of Civil War pensions for the widows of Union soldiers in the "colored regiments." *See* REGOSIN, *supra* note 22, ch. 3; Franke, *supra* note 22, at 268-90.

194. *See, e.g.*, Letter from William Wirt, Att'y General, to Hon. J. C. Calhoun, Sec'y of War (Mar. 27, 1823), in *PENSION LAWS NOW IN FORCE*, H.R. DOC. NO. 25-118, at 38 (2d Sess. 1838) ("Negroes, if in military service, [are] entitled to gratuities as other soldiers."); File of Dinah Blackman, W23627, Roll 254, Letter from J.C. Stuhuey to J.L. Edwards, Comm'r of Pensions

been particularly difficult for widows of color to secure testimony by “respectable” members of the community to support their claims. While the Pension Office does not appear to have excluded declarations submitted by non-whites, bias against testimony by persons of color may have weighed against African-American widows’ applications.<sup>195</sup>

The pension application of Dorothea Cooper, the widow of William Cooper, a seaman killed in the War of 1812 while serving on the USS *Constitution*, suggests as much.<sup>196</sup> According to a declaration filed in support of her pension application, Dorothea was a “mulatto woman” and William was an “Indian,” and both had worked for the Robert family of Brookhaven, New York.<sup>197</sup> In a declaration submitted by Daniel Robert, the adult son of the Robert family, he explained that the couple had been married

at a place called Poospatuck, an Indian Settlement or neighborhood about 2 miles from the house of deponent’s mother, by a person professing to be a minister of the gospel, who was a colored man or an Indian, . . . who was well known among the colored people and the Indians in Suffolk County by the appellation of Minister Paul.<sup>198</sup>

Apparently, Dorothea could provide neither records of her marriage to William nor any declarations by eyewitnesses to the ceremony.<sup>199</sup> Robert Rupell, presumably a pension agent retained to help process her claim, assured the Department that no “great confidence could be placed in the affidavit of any person present at the marriage,” as “most of the persons present if not all were doubtless persons of color and very illiterate.”<sup>200</sup> In the end, Cooper received her pension, but likely only because she was able to rely on the testimony of Daniel, by that time a lawyer in New York City, who declared that William and “the said Dorothea always passed for man and wife, and were always so considered by the family.”<sup>201</sup>

Some of the widows who relied solely on testimony evidence to support their claims to marital status were eventually successful in

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(Oct. 3, 1839) (describing Blackman, a pensioned widow, as a “colored woman”); File of Barsheba Benson, R775, Roll 221, Decl. of Job Congdon (Oct. 25, 1844) (noting that “Charles and Barsheba his wife were both coloured persons”).

195. Cf. LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 93 (1965) (discussing bias against the testimony of African Americans in courts of law).

196. File of Dorothea Cooper, NARA, Records of the Dep’t of Veterans’ Affairs, RG 15, Old Wars Pension Files, Widow’s File 272.

197. *Id.*, Decl. of Daniel Robert (June 8, 1819).

198. *Id.*

199. *Id.*, Letter from Rob[ert] M. Rupell to Hon. Smith Thompson, Sec’y of Navy (June 7, 1819).

200. *Id.*

201. *Id.*, Decl. of Daniel Robert (June 8, 1819).



obtaining the subsidy they sought, but the process was frequently a prolonged one and the outcome extremely uncertain. By insisting on official record evidence of marriage, and resisting community testimony as evidence of the legitimacy of women's relationships, the Pension Office rejected the vision of legal marriage that dominated the courts—a vision that focused on the social facts of marriage.<sup>202</sup> Instead, the Pension Office embraced and implemented a top-down bureaucratic conception of marriage that has been identified as an early twentieth-century phenomenon.<sup>203</sup> In so doing, the Pension Office alienated the very women for whom it was intended to provide. In the words of one pension agent: "This department then if it expects to exonerate itself from blame should show a more plausible reason for setting aside" reputation evidence provided by widows.<sup>204</sup>

### 3. Widows, the President, and Congress

The question, of course, is why were pension clerks so skeptical of widows' assertions of marital status, especially if common law marriage was widely recognized in the courts? One possible answer is that the clerks were simply asking a different question, in two senses. First, one could argue that the pension clerks were not charged with determining widows' marital status as a court of law might, but were simply evaluating evidence of marriage en route to a determination of a subsidy claim, and in that context were free to use more rigorous evidentiary standards. Second, one might reason that the technical standards of some of the military subsidy statutes required the pension clerks to be more demanding than the courts. As discussed above, certain statutes required the widow to prove that she was married as of a certain date, and therefore the Pension Office was justified in demanding record evidence in satisfaction of that requirement.<sup>205</sup>

Although both of these explanations appear to have some force, upon closer analysis they fail to adequately explain the Pension Office's resistance to women's assertions of marital status, especially when considered in light of the responses of Congress and high-level officials to the Pension Office's extremely cabined vision of marriage. As I show in this Section, the Pension Office struggled over the legal

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202. See *supra* text accompanying notes 105–24.

203. See *supra* text accompanying notes 120–22.

204. File of Elizabeth Anthony, W3914, Roll 68, Letter from A.A. Longg[e]s to J.L. Edwards, Comm'r of Pensions (July 15, 1845).

205. See sources cited *supra* note 56.

definition of marriage not only with widows and their agents, but also with Congress, which sought to require the Pension Office to use a more liberal definition of marriage. The Pension Office demurred, revealing a deep resistance to widows' claims to marriage that cannot be fully attributed to technical or evidentiary requirements of the subsidy statutes.<sup>206</sup>

Widows whose claims were denied by the Pension Office generally could not turn to the courts for assistance, but they could and did regularly turn to Congress to appeal the Pension Office's decisions.<sup>207</sup> In its capacity as an appellate adjudicator of pension claims, Congress frequently reversed the Pension Office's denial of widows' claims, employing a "liberal construction of the testimony" with regard to marriage.<sup>208</sup> For example, the Pension Office denied Thankful Reynolds's pension application because she had no record of her marriage, and because in declarations submitted in support of her claim she inadvertently gave two different dates for her marriage.<sup>209</sup> Commissioner Edwards took Reynolds's inconsistency as an indication of her untrustworthiness, explaining to Congress that "the department is justified in distrusting any parol evidence produced by a claimant who by that evidence stultifies herself upon oath and contradicts witnesses previously relied upon."<sup>210</sup> But on appeal to Congress, the Senate Committee on Pensions rejected Edwards's skeptical stance and his narrow reading of the pension statute. The Committee explained in plain terms that Reynolds had provided "ample evidence of a cohabitation between herself and her alleged husband, as man and wife, for a period of forty years or more."<sup>211</sup> In other words, she had satisfied the general definition of common law marriage.

Reynolds's experience was not exceptional. Susanna Rowe sought a pension under the Act of 1836, but was denied by the Pension Office when she could not provide record evidence of her marriage. In lieu of record evidence, she provided testimony by "nineteen citizens of the county of Harrison, all of whom are known to be respectable," as

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206. Widows encountered difficulty proving marriage to the Pension Office even when the statute under which they sought a subsidy contained no date-of-marriage limitation. *See, e.g.*, File of Susanna Angell, W1353, Roll 66; File of Rachel Anderson, W513, Roll 56.

207. *See* sources cited *supra* notes 151–53.

208. COMM. ON REVOLUTIONARY PENSIONS, MARY B. PERRY, AND OTHERS, H.R. REP. NO. 28-331 (1st Sess. 1844).

209. COMM. ON PENSIONS, REPORT, S. REP. NO. 26-160 (2d Sess. 1841).

210. File of Thankful Reynolds, W11118, Roll 2026, Letter from J.L. Edwards to Hon. J.C. Bates (Dec. 28, 1841).

211. COMM. ON PENSIONS, REPORT, S. REP. NO. 26-160 (2d Sess. 1841).

well as a declaration by the Clerk of Harrison County testifying to the satisfactory nature of the evidence provided.<sup>212</sup> The members of the House Committee on Revolutionary War Pensions were “unanimous in the opinion that the applicant is entitled to a pension.”<sup>213</sup> Similarly, the Pension Office denied Elizabeth Hillsman’s application for a pension due to her inability to procure a marriage certificate, notwithstanding the declaration of a “highly respectable witness” regarding her marriage.<sup>214</sup> Again, the Committee disagreed.<sup>215</sup> Mary Updegraph—who declared herself “poor, without any property, helpless, and dependent on the charity of the neighborhood for support”—also sought a pension, but the Pension Office denied her application because she had “no family Bible or record of her marriage.”<sup>216</sup> The Committee rejected the Pension Office’s determination and, based on testimony that Mary and Isaac Updegraph “lived together as man and wife, and [that] it was understood and believed they were married,” reported a bill in Mary’s favor.<sup>217</sup>

One might reason that Congress’s decision to use a liberal standard in assessing individual widows’ appeals is of little significance. After all, legislators had the authority to depart from the evidentiary and statutory standards that bound the pension clerks. Although Congress sometimes did use its discretion to depart from the strict requirements of the subsidy statutes, in many cases Congress made clear that it was *rejecting* the Pension Office’s understanding of

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212. COMM. ON REVOLUTIONARY PENSIONS, SUSANNAH ROWE, WIDOW OF JOHN ROWE, H.R. REP. NO. 25-713 (2d Sess. 1838).

213. *Id.*

214. See COMM. ON REVOLUTIONARY PENSIONS, REPORT, H.R. REP. NO. 27-913 (2d Sess. 1842) (referring to Richard Borum, who certified the validity of Elizabeth Hillsman’s marriage); see also File of Elizabeth Hillsman, W7854, Roll 1282, Decl. of Richard Borum (Feb. 4, 1840).

215. COMM. ON REVOLUTIONARY PENSIONS, REPORT, H. REP. NO. 27-913 (2d Sess. 1842). Interestingly, even after a successful appeal to Congress, Edwards insisted that Elizabeth procure a statement from the clerk of Amelia County, Virginia, regarding a record of her marriage, taking the step of requesting the evidence himself on a pre-printed War Department form designed specifically for that purpose. See File of Elizabeth Hillsman, W7854, Roll 1262, Letter from J.L. Edwards to the Clerk of Amelia County (Mar. 3, 1843).

216. COMM. ON REVOLUTIONARY PENSIONS, MARY UPDEGRAFF, H.R. REP. NO. 25-178 (3d Sess. 1839).

217. *Id.*; see also, e.g., COMM. ON REVOLUTIONARY PENSIONS, TABITHA BOSWORTH, H.R. REP. NO. 24-132 (2d Sess. 1837) (reciting witness testimony as adequate evidence of marriage); COMM. ON PENSIONS, REPORT, S. DOC. NO. 26-337 (1st Sess. 1840) (relying on witness testimony as adequate evidence of widow Pamela Allen’s marriage); COMM. ON PENSIONS, REPORT, S. REP. NO. 30-31 (1st Sess. 1848) (rejecting the Pension Commissioner’s determination, remarking that “the committee have examined the evidence with great care, and cannot resist the conclusion that the petitioner [Abigail Garland] was the lawful wife of said Jacob”).

what constituted a legal marriage.<sup>218</sup> Moreover, and of even greater significance, efforts to clarify and liberalize the legal definition of marriage used by the Pension Office were not limited to claim-by-claim review of widows' military subsidy applications. Both the President's office and Congress issued directives setting forth the standards to be used by pension clerks. Acting pursuant to the 1836 Act,<sup>219</sup> in 1838, 1840, 1846, and 1849, the President prescribed rules of evidence to be used in widows' pension claims: "The legality of the marriage may be ascertained by the certificate of the clergyman who joined them in wedlock, or the testimony of respectable persons having knowledge of the fact."<sup>220</sup> Despite these directions to allow use of reputation evidence as proof of marriage, widows struggled to obtain recognition by the Pension Office.

In 1846, following on "great complaints that applicants had been unjustly kept out of pensions by the fact that evidence clearly unreasonable and unjustified by law was required,"<sup>221</sup> Congress responded by enacting a statute directing the Office to use a more liberal standard for assessing widows' marital status and other required evidence.<sup>222</sup> The House debate leading to a vote on the 1846 statute is revealing. As an initial matter, it demonstrates that members of Congress were well aware of the problems facing widows seeking military subsidies. Prior to the debate, Representative McKay, Chairman of the House Committee of Ways and Means, solicited a

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218. Some committee reports make clear that the legislators believed the Pension Office to have erred in refusing to credit the widow's evidence of marriage, as in the claims of widows Rowe, Hillsman, Updegraff, and Garland, *see* sources cited *supra* notes 212 (Rowe), 214 (Hillsman), 216 (Updegraff), 217 (Garland), while others make clear that the legislators were granting a pension despite the applicant's failure to perfectly satisfy the statutory requirements, *see, e.g.*, COMM. ON PENSIONS, REPORT, S. REP. NO. 30-28 (1st Sess. 1848) (awarding pension denied by Commissioner due to "sufficiently strong" evidence of widow Elizabeth Pistole's marriage even though evidence did not perfectly comply with requirements); COMM. ON REVOLUTIONARY PENSIONS, HANNAH ELDRIDGE, H.R. REP. NO. 24-124 (2d Sess. 1837) (acknowledging widow did not fit within exact language of the statute, but finding her entitled to a pension).

219. Act of July 4, 1836, ch. 362, § 5, 5 Stat. 127, 128.

220. *Rules of Evidence in Widows' and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, H.R. DOC. NO. 25-118, at 102 (2d Sess. 1838); *Rules of Evidence in Widows and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, H.R. DOC. NO. 26-126, at 101 (1st Sess. 1840); *Rules of Evidence in Widows and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, H.R. DOC. NO. 29-95, at 139 (1st Sess. 1846); *Rules of Evidence in Widows' and Orphans' Claims*, in PENSION LAWS NOW IN FORCE, S. Doc. 30-54, at 48 (2d Sess. 1849).

221. CONG. GLOBE, 29th Cong., 1st Sess. 385 (1846) (statement of Rep. Tibbatts). Congressmen were concerned about both the Pension Office's requirement that the widow produce "evidence of [her deceased husband's] service notwithstanding the department has the evidence in file" and its requirement that she "produce record of the marriage." *See id.*

222. *See* Act of May 7, 1846, ch. 13, § 2, 9 Stat. 5, 6.

letter from Commissioner Edwards to explain exactly how the Pension Office evaluated widows' claims.<sup>223</sup> In his letter, Edwards assured the legislators that "we do not require any proof of the fact of marriage, more than a court of justice would deem necessary," but then defended the Pension Office's rigid approach on the grounds that some widows' military pension statutes required that the widow be married as of a certain date.<sup>224</sup>

But the majority of the legislators disagreed with the Commissioner. They rejected his contention that the Pension Office's approach to widows' marital status conformed to the standards used by courts.<sup>225</sup> And, as important, they found the Pension Office's approach to marital status to be inconsistent with their own understandings of what constituted marriage.<sup>226</sup> At least one particularly outraged representative, Hannibal Hamlin of Maine, complained that the Pension Office's treatment of widows generally was "wrong in spirit, wrong in substance, and wrong from beginning to end."<sup>227</sup> Other legislators were more measured in their criticism of Commissioner Edwards's approach to widows' claims, but they nevertheless lamented his narrow construction of the law of marriage.<sup>228</sup> Their sustained debate concerning Pension Office procedures and the standard used by courts to evaluate the lawfulness of marriage—going so far as to consult a well-known evidence treatise during the floor debates—suggests that the legislators recognized that the statutory rights they created for widows were only as good as the administrative system that implemented them.<sup>229</sup>

Explicitly rejecting the Pension Office's defense of its narrow bureaucratic approach to marriage, Congress enacted a statute directing that widows be required to provide "such proof as would be sufficient to establish the marriage between the applicant and the

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223. CONG. GLOBE, 29th Cong., 1st Sess. 384 (1846) (statement of Rep. McKay).

224. *Id.* (reprinting letter from J.L. Edwards to Rep. McKay).

225. *Id.* (statement of Rep. Jones):

It was not the law that record evidence was required in courts of justice, unless it be proved to the court that there is record evidence. Record evidence was the higher evidence; then the evidence of persons present at the marriage; then evidence by reputation—to wit: that the parties had been living together as man and wife.

226. *Id.*

227. *Id.* (statement of Rep. Hamlin).

228. *See, e.g., id.* at 385 (statement of Rep. Adams) (describing Commissioner Edwards as an "admirable officer," but objecting to the evidentiary burdens imposed on widows by the Pension Office).

229. *See id.* at 386 (statement of Rep. Jenkins) (consulting 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROCESS IN CIVIL AND CRIMINAL PROCEEDINGS (London, 1824)).

deceased pensioner in civil personal actions in a court of justice.”<sup>230</sup> The 1846 Act provided a clear message: the Pension Office should comply with the governing legal standards articulated by courts, including courts’ recognition of common law marriage, in order to effectuate Congress’s efforts to provide for these women. And, indeed, the Attorney General understood this to be the case. In a formal opinion issued in June of 1846, Attorney General John Mayson advised Secretary of War Marcy that

The 2d section of the act of May 7, 1846, was intended to facilitate applications of widows to pensions founded on their marital relations, by operating on the proof required. . . . General reputation and cohabitation are, in general, sufficient evidence of marriage; but as this is only presumptive, it may be rebutted by countervailing testimony. The law should be construed liberally and favorably towards applicants.<sup>231</sup>

Accordingly, he continued, the 1846 Act explicitly barred the Pension Office from requiring widows to provide record evidence:

The general rule is “that in all civil personal actions . . . general reputation and cohabitation are sufficient evidence of marriage” . . . . Under this section [of the 1846 Act], therefore, to establish the relation of widow, proof of a marriage in fact cannot be required—that is, by witnesses present at the ceremony, or by official records: general reputation and cohabitation are sufficient, *prima facie*. . . . [T]he proof ought to be considered in the spirit in which this law has been passed, of liberality to the applicant.<sup>232</sup>

Despite these directions from the President, Congress, and the Attorney General—all designed to bring the Pension Office in line with judicial definitions of marriage—the Pension Office continued to block widows’ subsidy applications by demanding record evidence of marriage, and remained suspicious of reputation evidence. In 1850 the Acting Secretary of the Department of the Interior had to remind Commissioner Edwards once again that “[t]he continuous cohabitation of the parties as man and wife for so many years, and the birth of so many children, consecutively acknowledged and treated as legitimate, being prov[ed], the marriage might well be presumed, aside from the direct affidavit of [the widow] herself.”<sup>233</sup>

Even then, however, the Pension Office continued to insist on record evidence and required widows to provide an official accounting of the absence of such evidence. Thus, following his immediate

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230. Act of May 7, 1846, ch. 13, § 2, 9 Stat. 5, 6.

231. 4 Op. Att’y Gen. 496, 496–97 (1846).

232. *Id.* at 498–99.

233. Letter from D.C. Goddard, Acting Sec’y of the Dep’t of the Interior, to James L. Edwards, Comm’r of Pensions (Sept. 13, 1850), *quoted in* MAYO & MOULTON, *supra* note 42, at 581, 582. By 1850, the Pension Office was housed in the Department of the Interior. *See supra* note 129. Thus, Goddard was Edwards’s direct superior when he wrote this letter.

predecessor's model carefully, in 1850 newly appointed Pension Commissioner James Heath issued "Circular No. 3," which pension clerks were to send to "claimant(s) or agent(s)," providing the following guidance regarding proof of marriage:

[A] copy of the public or private record of her marriage . . . with a certificate of its correctness, and of the genuineness of the original. If there is no such record of this event, she must furnish an affidavit to that effect, and adduce the positive testimony of persons certified to be credible and disinterested, fully proving it. If the marriage is proved by the person who solemnized it, his authority to act in the premises must be produced. Parol testimony of the marriage of the parties will not be considered till the absence of record proof of the fact is accounted for. In all cases where the testimony is taken before a magistrate, his official character must be certified by the clerk of the proper court, under seal.<sup>234</sup>

The Pension Office remained set in its ways with respect to the definition and proof of marriage. Bureaucratic resistance to widows' claims was chronic, and mandates from on high seem to have had little impact on the Office's practices. Instead, the Pension Office engaged in bureaucratic disentitlement, using procedural hurdles to delay or deny widows' claims in a manner that ran directly counter to congressional intent. Susanna Angell's pension agent suggested as much in a letter to the Pension Office in which he specifically invoked the 1846 statute, reminding the Pension Office that "by the 2[nd] Section of the act of May 7, 1846 relative to the proof of marriage of widows to deceased pensioners, such evidence of marriage is required as would be satisfactory in a Court of Justice."<sup>235</sup> By requiring significantly more of widows, the agent argued, the Office had "repudiated" Congress's will.<sup>236</sup>

### *C. Bureaucracy, Ideology, and Marriage Law*

We return, then, to the question of why the pension clerks consistently "repudiated," on a broad scale, both the reigning definition of legal marriage and Congress's specific will with respect to the administrative adjudication of widows' marital status. Perhaps the most obvious answer is that the Pension Office was charged with protecting government assets and sought to restrict allocation of those assets by using a narrow definition of marriage, which would minimize the number of women who were subsidy eligible. This is an

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234. *Circular No. 3, Widow's Claim Suspended, and this Circular Sent to Claimant or Agent, on Account of Defective Evidence*, reprinted in MAYO & MOULTON, *supra* note 42, at 676.

235. File of Susanna Angell, W1353, Roll 66, Letter from Ben[jamin] Cowell to Hon. L.P. Waldo (Aug. 13, 1853).

236. *Id.*

important part of the answer, but it is too simple an account to capture the complicated ideological, political, and institutional pressures that shaped the administration of widows' military subsidies.

As an initial matter, when one considers why the Pension Office imposed and implemented a limited and bureaucratized definition of marriage, it is important to account for the deeply ingrained norms concerning women's marital dependency that simultaneously informed and were challenged by the creation of marriage-based entitlements. The administrative system that developed to facilitate the distribution of widows' military subsidies did not develop in an ideological vacuum. Rather, it existed in a world, described above, in which social provision for women on the basis of marriage marked a departure from the longstanding view that marriage was a source of private, rather than public, support for women.<sup>237</sup> Due to the highly stylized nature of widows' military subsidy applications, and the often formulaic nature of the pension clerks' correspondence with widows and their agents, the applications themselves rarely betray the clerks' or Commissioner Edwards's reasoning about the propriety of public subsidies for widows. Nevertheless, the Pension Office's resistance to widows' claims of marital status was certainly consistent with a normative conception of marriage that located the material well-being of family dependents, including widows, as the responsibility of the private family—a vision that led at least some national legislators to contest the propriety of a broad-scale system of widows' subsidies.<sup>238</sup>

Against this ideological backdrop, one can better understand how the complex political economy of military subsidies functioned to narrow the Pension Office's operating definition of marriage. On the one hand, the President and Congress directed the Pension Office to accept reputation evidence of marital status. Congress also repeatedly expanded the class of widows who were to receive pensions and frequently reversed the Pension Office's individual determinations when the Office refused to recognize women's claims to widowhood.<sup>239</sup> An opinion by the Attorney General's Office also directed the Pension Office to employ a broader conception of marriage.<sup>240</sup> One would think that such direct pressure from above would have led the Pension

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237. See *supra* Part II.A.

238. See discussion of legislative resistance to widows' military subsidies *supra* Part II.C.

239. See *supra* Part I.A and text accompanying notes 208–18.

240. See 4 Op. Att'y Gen. 496 (1846).



Office to be more generous toward the women who sought the benefit of the subsidy statutes, notwithstanding the novel nature of a public marriage-based entitlement.

But the Pension Office's predicament was not so straightforward. As is common today, as the front-line officials in charge of distributing public funds, administrators in the Pension Office operated under conflicting pressures from Congress. Although Congress wanted to bring significant numbers of worthy widows into the military subsidy system, it also wanted to protect the government coffers against both meritless and fraudulent claims. At least two significant fraud crises had shaken the military subsidy system by the mid-1830s.<sup>241</sup> The first, in 1818, had led to the dismissal of the head of the Office for misfeasance and the appointment of James Edwards, first as Chief Clerk and then, in 1833, as Commissioner.<sup>242</sup> Allegations of widespread fraud also drove Congress to take significant oversight measures. Hearings regarding the Pension Office's operation were not unusual, and as of 1835, Congress required comprehensive annual reports from the Office and additional reports as to issues as mundane as staffing.<sup>243</sup>

From the perspective of Commissioner Edwards, originally tapped to run the Office in the wake of a fraud scandal, and the individual clerks, these two considerations—liberal provision of subsidies to widows and efficient and accurate sorting of claims—were not likely to have been equally weighted. While a widow could appeal an adverse determination to Congress and, if she was fortunate, receive the benefit of Congress's munificence, the Pension Office's use of a liberal standard would have arguably swollen the pension rolls and exposed the Office to charges of mismanagement of government funds and potentially even more onerous oversight by Congress. In this micro-institutional context, it is far less surprising that Edwards would create eligibility criteria most likely to protect the federal coffers, and least likely to imperil the Office's institutional standing.

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241. See RESCH, *supra* note 22, at 124–25 (discussing veterans' pension scandals); sources cited *supra* note 130.

242. See RESCH, *supra* note 22, at 124–25.

243. See, e.g., REPORT FROM THE SECRETARY OF WAR IN OBEDIENCE TO RESOLUTIONS OF THE SENATE OF THE 5TH AND 30TH OF JUNE, 1834, AND THE 3D OF MARCH, 1835, IN RELATION TO THE PENSION ESTABLISHMENT OF THE UNITED STATES, S. DOC. 23-514 (1st Sess. 1835); LETTER FROM THE SECRETARY OF WAR, TRANSMITTING A LIST OF THE NAMES OF THE CLERKS EMPLOYED IN THE DEPARTMENT OF WAR DURING THE YEAR 1830, AND THE COMPENSATION OF EACH, H.R. DOC. NO. 21-45, at 1 (2d Sess. 1830) (reporting of clerks in War Department pursuant to Act of Apr. 20, 1818). This kind of congressional oversight was not unusual during the period. Mashaw discusses a similar trend with respect to the Land Office in the 1830s. See Mashaw, *Administration*, *supra* note 125, at 1668–69.

And, in fact, Edwards's 1846 letter to Congress concerning the Pension Office's standards clearly indicates that Edwards himself erred on the side of excluding widows' claims.<sup>244</sup> It is also little surprise that the pension clerks—appointees who worked under Edwards's "immediate direction" and whose livelihoods depended on his continuing approval<sup>245</sup>—adopted the decisional path that limited the government's liability for women's material support.<sup>246</sup>

The generous and flexible definition of marriage used by judges was also contrary to the bureaucratic culture of the Pension Office. Although it was among the first federal administrative agencies, by the time it was statutorily authorized in 1833, the Pension Office had already become a complex bureaucracy of the sort described by the great early twentieth-century sociologist Max Weber: a hierarchically organized office that undertook specialized administrative functions and rendered decisions pursuant to rigidly formulated rules. Pension clerks were archetypal bureaucrats. It appears that they had little discretion and were directly accountable to their immediate supervisor, Edwards. Moreover, although the pension clerks made individual eligibility determinations, the sheer volume of claims they handled necessitated that they make those determinations according to "calculable rules [discharged] without regard for persons."<sup>247</sup> Pension clerks were not just legal officials with an institutional incentive to cabin the government's obligation to absorb the costs associated with women's dependency. They were also rule-bound

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244. See *supra* text accompanying notes 221–29.

245. LEWIS CASS, REPORT OF THE SECRETARY OF WAR, H.R. DOC. NO. 22-2, at 31 (2d Sess. 1832); see also *supra* note 143 and accompanying text.

246. It is interesting to speculate whether the pension clerks' decisions on widows' subsidy claims were influenced by pressure created by patronage politics and the rotation system. Under this theory, the pension clerks were pressured into deciding pension claims in a certain way due to the threat of dismissal that often loomed in a system in which civil servant positions were controlled by the party in power. That theory is at the core of Theda Skocpol's explanation for the expansion of the Civil War pension system in the late nineteenth century. See SKOCPOL, *supra* note 16, at 120–30. Upon closer inspection, however, the political patronage theory holds little explanatory power for the phenomenon I describe here. First, Skocpol seeks to explain why pension administrators were more liberal in the award of pensions. She reasons that pension administrators were under pressure from legislators, who sought to secure electoral support by securing pensions for constituents through intervention in the administrative process. *Id.* By contrast, I describe administrative resistance to Congress's efforts to liberalize the widows' pension system. Moreover, and just as important, although the rotation system and patronage politics began to take shape in the 1830s, see CRENSON, *supra* note 125, at 48–71; Mashaw, *Administration*, *supra* note 125, at 1613–28, as I explain above, Commissioner Edwards seems to have been insulated from the rotation system. See discussion *supra* note 145.

247. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 975 (Guenther Roth & Claus Wittich eds., 1968) (1922). Weber considered "calculable rules" to be the most important element of modern bureaucracy. See *id.*

bureaucrats whose discretion was circumscribed by internal department memoranda, circulars, and the direct oversight of the Pension Commissioner.<sup>248</sup>

The bureaucratic restraints on pension clerks' adjudicative powers come into relief when contrasted with the institutional decisionmaking conditions of common law judges, who tended to decide legal claims pursuant to precedent rather than rules.<sup>249</sup> Perhaps more so than today, judges in the nineteenth century were empowered by their office and the common law method. They could and did use their office to shape the contours of legal marriage in a manner that gave deference to the sanctity of private contracting and secured for women what little material security marriage had to offer.<sup>250</sup> Implicit in this account is that the common law judge had the authority to employ a definition of marriage that was broad and highly discretionary. Certainly, judicial decisionmaking was limited by all manner of official and unofficial constraints: precedent, appellate oversight, and institutional and cultural values. But the hierarchical power structure of judicial systems was (and is) relatively weak in contrast with that of bureaucratic organizations.<sup>251</sup>

Unlike a common law judicial system in which decisionmaking is based on precedent and analogical reasoning, the strict rule-based approach to marriage used by the Pension Office—the privileging of record evidence that conformed with the Office's particular standards—presumably allowed for efficient resolution of military subsidy claims and also protected the pension clerks from charges of irresponsible management of public funds or, worse, complicity with fraud.<sup>252</sup> As Jerry Mashaw has observed, "Administrators . . . shrink from unconstrained discretion in themselves and fear the centrifugal

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248. See sources cited *supra* notes 148–49, 157 and 220.

249. Justice Benjamin Cardozo's own account of common law adjudication suggests a similar vision of common law methodology—one in which analogy, historical development of the law, justice, morals, mores, and social welfare would all play a part in the decision making process. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 9 (1921) (discussing common law adjudication and the evolution of precedent).

250. See *supra* Part II.A.

251. It is little wonder that, in his study of legal bureaucracy, Weber explicitly excluded English and American courts from his description of bureaucracy precisely because common law judges rendered judgments not according to rules, but "by depending upon and interpreting concrete 'precedents,'" exercising what he called "empirical justice." See WEBER, *supra* note 247, at 976; see also Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1444 (1983) (describing the judicial system as relatively non-bureaucratic).

252. The rule-based approach to the legal definition of marriage may have been particularly suited to a federal administrative setting in which the pension clerks lacked the benefit of judicial process where legal theory and evidence are subject to the adversarial process and witnesses are subject to credibility determinations.

effects of discretion in subordinates. If for no other reason than self-protection, they often seek to establish guidelines for their own discretionary judgments.”<sup>253</sup> The institutional conditions under which pension clerks worked—a hierarchically organized office charged with the individualized adjudication of thousands of claims—discouraged discretion by the individual clerk, while the ideological norms, fiscal pressures, and political economy of the Commissioner’s position led him to mandate a narrow, bureaucratic definition of marriage.

As I explain in greater detail below, despite the very different legal definitions of marriage that emerged in the judicial and administrative contexts, and the disparate financial incentives and institutional conditions that shaped judges’ and clerks’ adjudicative practices, their determinations regarding marital status were consistent in one important regard: both effectively limited the public’s liability for what was traditionally a private liability. Thus, although they were doctrinally distinctive, the liberal definition of marriage employed by the courts and the narrow definition of marriage used by the Pension Office both reaffirmed the core liberal vision of the private family as the proper source of women’s support.

### III. INSTITUTIONAL PLURALISM

Women’s experiences navigating the military subsidy system provide a very different view of the legal construction of marriage—how intimate heterosexual relationships were marked as legitimate by the state—than is generally associated with the early nineteenth century. According to the traditional story of common law marriage in that period, most courts were solicitous of women’s claims to marital status, as epitomized by James Kent’s 1809 opinion recognizing common law marriage.<sup>254</sup> This story is by no means wrong, and it accounts for extremely important and influential statements of the law of marriage at the time. However, if, as Christopher Tomlins has argued, law is generated in part through “professional juridical (official) discourse and the institutional locales in which it is spoken,”<sup>255</sup> then we need to account for the multiple locales from which such discourse emanated at any given moment. The administrative processes that were used to decide widows’ military

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253. Mashaw, *Reluctant Nationalists*, *supra* note 125, at 1685.

254. *Fenton v. Reed*, 4 Johns. 52, 52 (N.Y. Sup. Ct 1809) (per curiam); *see also supra* text accompanying note 108.

255. Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT’L LAB. & WORKING CLASS HIST. 56, 67 (1995).

subsidy claims introduced new procedures and players into the mix. Judges, the elite legal officials in most accounts of nineteenth-century law, receded to the margins, and a different set of legal actors appeared. Congress was surely involved—as master of the statutory subsidy scheme, as appellate adjudicator of claims brought under those statutes, and as a fairly weak overseer of the administrative processes used to evaluate widows' claims. The Attorney General's Office routinely opined on the proper construction of the military subsidy statutes. The President even played a part, both in the legislative process and in the promulgation of evidentiary rules. And a new legal actor emerged: the pension clerk authorized to adjudicate individual claims against the government.

Now, one way to understand the pension clerks' resistance to the reigning judicial definition of marriage is that the pension clerks were simply wrong-headed with respect to the legal definition of marriage at the time. By this account, whatever its causes, the Pension Office's bureaucratic conception of marriage was a departure from the authoritative standard—"the law," or the "law in the books"—and represented a failure of implementation.<sup>256</sup> From this perspective, the Pension Office's narrow definition of marriage was no more than a context-specific phenomenon with little significance to the legal history of the regulation of marriage.

But such an explanation errs in at least two respects. First, it minimizes the important ways in which administrators not only enforced legal principles as propounded by judges and lawmakers, but also generated law in their front-line interactions with citizens.<sup>257</sup> In other words, the Pension Office's rule-based approach to marital status and effective repudiation of the broad definition of marriage used by judges was an example not of bureaucracy's tension with law, but of bureaucracy's force in shaping law. As I argue in this Part, the Pension Office's definition of marriage should not be understood as

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256. Cf. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 924, 934–35 (1985) (arguing that "gap analysis" fails to adequately explain the differences between "law-in-action" and "law-in-the-books"). In addition to its theoretical limitations, any defense of the proposition that a judicial definition of marriage represented "the law" of marriage would need to account for the fact that judicial embrace of common law marriage sometimes entailed resistance to efforts by legislators and municipal officials to define marriage differently. From the perspective of legislators, then, it would appear that the judicial standard constituted a departure from "the law." Cf. GROSSBERG, *supra* note 10, at 87–100 (discussing judicial resistance to legislatures' efforts to formalize and standardize the legal definition of marriage).

257. Cf. Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409, 410 (1988) (examining how "exchanges between [court] clerk and citizens produce legal and moral frameworks").

aberrant, but as constituting an alternative, state-centered vision of marriage, one that was doctrinally in tension with, but, in important respects, functionally and ideologically consistent with, the judicial construction of legal marriage. Second, an explanation that portrays the pension clerks' bureaucratic vision of marriage as simply wrong also obfuscates the hitherto unexamined pluralism in nineteenth-century marriage law—a pluralism that was generated, in part, by pressures created by the administration of the first broad-scale system of marriage-based entitlements.

### *A. Administering and Constituting Marriage Law*

How did the Pension Office's adjudication of marital status help constitute the legal status of marriage? As scholars of law and society have long insisted, law informs social knowledge and influences behavior in myriad ways. Most dramatically, the law wields its authority through violence (or the threat of violence), the use of which is often subject to judicial approval.<sup>258</sup> But law also shapes knowledge and behavior. It gives legal meaning to everyday interactions and relationships by rewarding certain behaviors with social, political, or material goods. It labels certain practices and values as conventional and others as antisocial, and, on a fundamental level, it provides a vocabulary through which everyday practices can be imagined and discussed in legal terms.<sup>259</sup> Hence, the law's power derives in part from its capacity to shape the way people articulate claims concerning the most rudimentary aspects of their lives, including claims based on marriage.<sup>260</sup> And it exerts such power in the context of multiple legal and nonlegal interactions, including the routine administrative procedures that often remain invisible precisely because we tend to look for "the law" in judicial opinions.

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258. As Robert Cover famously observed, "Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

259. For a very good summary of constitutive theories of law, see Sarat & Kearns, *supra* note 31, at 27–32; see also Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731, 732, 736–43 (1992) ("We do not see the law as something outside of social life, acting on or being acted upon; rather we are attempting to find the threads of law and legality within the tapestry of ordinary lives and everyday events.").

260. This theory of law's power is traceable to social theorist Antonio Gramsci's theory of ideology. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 375–77 (Quintin Hoare & Geoffrey Nowell Smith eds., trans., International Publishers 1971).

In the early nineteenth century, both courts and the Pension Office provided institutional frameworks in which women crafted and articulated claims for the legality of their marriages. But in each institutional setting, widows were prompted to conceive of their marital relationships in different ways.<sup>261</sup> If a widow asserted her legal status as a wife or widow in a court of law, evidence of the community's recognition of the couple's marital relationship, and the pair's conformity with the social practices and gender roles generally associated with marriage, were readily accepted as evidence of a legal marriage.<sup>262</sup> In this scenario, the state responded to and legitimized the claims of women who sought legal recognition of the "social facts of their relationship," as acknowledged by the community.<sup>263</sup> Katharine Silbaugh has described this as a bottom-up, or "polycentric," marriage regime, one in which the state recognizes and legitimizes the community's social practice of marriage.<sup>264</sup>

By contrast, in the context of seeking military subsidies, women were given material incentive to craft their claims to marital legitimacy in a significantly different manner. Certainly, widows called on their neighbors to testify to their marriages, but under the Pension Office's standards, the community's recognition of a couple's marriage lost much of its legal salience.<sup>265</sup> Over such community-based indicia of marriage, the Pension Office privileged official licensing and recording processes and the couple's conformity with those processes. The difference may appear evidentiary rather than substantive. But that distinction is inaccurate for two reasons. First, dismissing the distinction between how administrators and judges

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261. For a wonderfully rich discussion of nineteenth-century women's consciousness of their rights as married women as *legal* rights, see Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J.L. & HUMAN. 79 (1988).

262. See Dubler, *Wifely Behavior*, *supra* note 10, at 968 ("Courts . . . could grant a couple marital status if they had cohabited like a married couple, if they had held themselves out to their community as married, and if their community had accepted them as such."). By foregrounding a legally recognizable definition of law, I do not mean to suggest that when imagining what it meant to be married, an individual in the nineteenth century might not have first and foremost described his or her relationship as one that was sanctioned by church, God, and community.

263. Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189, 195 (2005); see *supra* text accompanying note 8.

264. See Silbaugh, *supra* note 263, at 194:

During this time, the marriage name and symbol were known to be social as well as legal judgments, and the authority over the label was polycentric: when a couple used the term "marriage" to describe themselves to others, consistently, and lived together in a social practice thought of culturally as marriage, that marriage became a legal fact.

265. See *supra* Part II.B.

evaluated the legality of a marriage as simply evidentiary misconceives the centrality of evidence law to the doctrine of common law marriage generally.<sup>266</sup> Second, such a distinction fails to acknowledge that the law exerts its influence in part by shaping the way people make claims about the legal significance of their everyday lives and practices. The Pension Office's insistence on official record evidence of marriage pushed women to describe their marriages in terms that privileged official license over community recognition. By seeking recognition of their status as wives and widows in the terms dictated by the Pension Office, these women reinforced a state-centered construction of marriage, even as they resisted that construction in their applications. This, in turn, helped shape how marriage was understood as a legal status and as a source of legal rights.

It is, of course, impossible to ascertain with precision how the experiences of tens of thousands of women seeking subsidies might have shaped a collective or even individual understanding of what constituted legal marriage. It is worth recalling, however, that the phenomenon of women applying for military subsidies was by no means unusual or unknown, and as a formal legal process it may very well have been at least as common as private law litigation in which a woman was required to prove her marital status in order to prevail on a claim for, say, dower or inheritance. Thousands of copies of commercial military subsidy guides were sold for the benefit of pension agents, local officials, and the would-be pensioners themselves, and those guides described the standards actually used by the Pension Office to determine the legality of a marriage.<sup>267</sup> When a new widows' pension statute was enacted, widows and pension claims agents promptly wrote to the Pension Office and Congress seeking information about the statute and the administrative process for obtaining a subsidy.<sup>268</sup> In the process of seeking out eligible widows

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266. See Dubler, *Wifely Behavior*, *supra* note 10, at 970:

A court within a common law marriage jurisdiction still had to adjudicate in each specific case whether the particular plaintiff before it deserved recognition as a party to a valid common law marriage. In this respect, evidence law took its place next to contract law as a critical piece of the doctrine.

267. In 1854, three commercial guides appeared on the market: Mayo and Moulton's 900-plus-page volume, Triplett's slimmer but less comprehensive 270-page guide, and a 500-plus-page volume by C.W. Bennett. See C.W. BENNETT, *A DIGEST OF THE LAWS AND RESOLUTIONS OF CONGRESS RELATIVE TO PENSIONS, BOUNTY LANDS, ETC.* (Wash., D.C., Holman, Gray & Co. 1854); MAYO & MOULTON, *supra* note 42; TRIPLETT, *supra* note 43.

268. Letter from Geo[rge] J. Curtis to N. Moulder (Nov. 4, 1836), NARA, Records of the Accounting Officers of the Dep't of the Treasury, RG 217, Records of the Office of the Second Comptroller, Army Pension Div., Entry No. 202 (pension claims agent "requesting the favor of a



and working with individual women to develop their applications, pension claims agents necessarily conveyed information to widows regarding how to establish the legality of a marriage, including the central importance of record evidence. Throughout the administrative ordeal of proving their marital status, women enlisted the help of all manner of people, including town officials, family members, neighbors, old acquaintances, and ministers.<sup>269</sup> Surely the difficulty of establishing the legal status of their marriages, and the Pension Office's skepticism of reputation evidence, was not unknown to these participants in the process. Through these various channels, news of the Pension Office's bureaucratic definition of marriage—experienced by tens of thousands of women directly and likely shared with tens of thousands of others—narrowed the socio-legal conception of what constituted a marriage in the early nineteenth century.

### *B. Pluralism in Nineteenth-Century Marriage Law*

By arguing that the bureaucratic conception of marriage generated by the administrative processes of the Pension Office informed the socio-legal construction of marriage, I do not contend that this vision of marriage replaced the generous conception of marriage prevalent in the courts. But I do urge that we account for marriage law's implicit and explicit pluralism as it functioned as a source of, and limitation on, women's rights, privileges, and obligations. At the most basic level, the concept of legal pluralism refers to a "situation in which two or more legal systems coexist in the same social field."<sup>270</sup> At a deeper level, the theory of legal pluralism challenges what Harry Arthurs has termed "legal centralism,"<sup>271</sup> the notion that law could (or should) be adequately accounted for by attention to the legal decisions and purportedly neutral principles

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Circular . . . by the Department in relation to the Act of Congress of 4th July 1836" and noting that "it will be of service to many aged persons in this neighborhood"); cf. CONG. GLOBE, 29th Cong., 1st Sess. 284 (1846) (statement of Rep. Hopkins) ("It was known that every member of the House had constituents constantly writing for information in relation to these pension laws.").

269. See *supra* Part II.B.

270. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988). Legal pluralism is often associated with studies of the relationship between colonial and indigenous forms of law and ordering, and is also identified with social and legal ordering in international law and federated legal regimes. *Id.* at 869. However, the concept of legal pluralism has a long history, and found a happy intellectual home in legal realism, and a more recent roost in the law-and-society movement. *Id.*; see also Robert W. Gordon, *Without the Law II*, 24 OSGOODE HALL L.J. 421, 429-30 (1986) (reviewing H.W. ARTHURS, "WITHOUT THE LAW": ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND (1985)).

271. ARTHURS, *supra* note 270, at 2.

emanating from the state, and particularly courts.<sup>272</sup> Thus, as applied to administrative law, legal pluralism rejects the notion that decisions and principles of administrative agencies are simply enforcement tools that can or should be brought within a singular or “central” legal order governed by judges.<sup>273</sup>

From this perspective, the question posed by Theophilus Parsons in 1853—“What constitutes a legal marriage?”—admitted of no singular answer. It was the generous vision of marriage used by the courts that favored couples’ private contracts, as captured in the maxim *semper praesumitur pro matrimonio*. It was the polycentric notion of marriage that privileged the community’s understanding of the practices of marriage. It was also, however, the rigid, legalistic vision of marriage that turned to the (often nonexistent) official record to distinguish between those intimate heterosexual relationships that merited recognition under the law and those that did not. Contrary to claims today that marriage has had an enduring socio-legal form, marriage law of the early nineteenth century was informed by multiple sources of legal authority emanating from different institutional contexts.

Such pluralism in the legal definition of marriage should not be confused with the modern understanding of pluralism as a source of liberation.<sup>274</sup> In modern debates over same-sex marriage, for example, legal pluralism has been described as a phenomenon with liberatory potential, especially in the family law context. Thus, Amy Wax describes the concept of pluralism as “the notion that individuals are free to choose how to construct their ‘family of choice.’”<sup>275</sup> Similarly, Katherine Franke has evaluated the possibility that legal pluralism could be useful to “those who seek the expansion of sexual liberty through the vehicle of same-sex marriage.”<sup>276</sup> But regardless of the emancipatory potential of pluralism, the plural marriage law regimes

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272. Gordon, *supra* note 270, at 421.

273. See ARTHURS, *supra* note 270, at 132, 164.

274. For a discussion of this pluralist tradition, see Gordon, *supra* note 270, at 429 (describing the “political Pluralists,” such as Harold Laski and F.W. Maitland, as being “concerned with vindicating, against the intensifying power of a centralizing state on the one hand and of an atomizing individualism on the other, the claims to self-government of associations . . . and to enlarge the opportunities for people to realize their political and spiritual goals through participation in such groups”).

275. Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 380–81 (2007).

276. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2690 (2008). Franke ultimately declares her “pessimis[m] about the utility that legal pluralism scholarship can bring to the project of rescuing sexual liberty from the vice of liberal same-sex marriage arguments.” *Id.* at 2692.

of the early nineteenth century did not provide “choice” to individuals; rather, these multiple regimes enhanced the power of the state to control the institution of marriage. Differing institutional incentives generated conflicting legal standards for the individual women who sought the benefits of marriage’s protection and, viewed systemically, gave the state latitude to manipulate the contours of legal marriage.

In saying as much, I do not suggest that the law is simply an imposed ordering mechanism that individuals play no role in creating. To the contrary, as Barbara Yngvesson has observed, law “is neither ‘from above’ nor ‘from below’ but simultaneously separate and immanent, imposed and participatory.”<sup>277</sup> As discussed above, women were themselves participants in the creation of marriage as a legal status. But their role was a heavily scripted one, drafted largely by various legal officials—agents, lawyers, clerks, judges—who pressed women to articulate their claims to marital status in particular ways. Individual women both complied with and resisted these scripts. Whether in court or in administrative processes, some women were able to negotiate the various available definitions of marriage, making best use of the facts of their particular circumstances to avail themselves of whatever private or public law benefits a legal finding of marriage offered. In the context of military subsidies in particular, widows, or agents acting on their behalf, routinely objected to the Pension Office’s definition of marriage and treatment of widows.<sup>278</sup> The widows sought intervention by their senators and representatives, and they formally appealed denials by the Pension Office by petitioning Congress.<sup>279</sup> Such resistance sometimes paid off, as when widows were fortunate enough to appeal successfully to Congress.

Nevertheless, it would be a mischaracterization to suggest that the pluralism I am describing in early nineteenth-century marriage law facilitated women’s legal self-determination in any robust sense. This was a legal pluralism created by the very different political, institutional, and fiscal pressures that informed the private law of marriage implemented by judges, on the one hand, and public law marriage-based entitlements administered through a bureaucracy, on the other. It was a pluralism that was consistent with, if not animated by, a deep ideological commitment to the ideal of a self-sustaining family unit, and a parallel suspicion of government “charity” generally. And, ultimately, it was a pluralism that gave legal officials,

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277. Yngvesson, *supra* note 257, at 412.

278. See *supra* Part II.B.2–3.

279. See *supra* text accompanying notes 208–18.

not women, the ability to provide different answers to the question of “what constitutes a marriage,” thereby enabling the state to better control marriage as a legal status and, with sensitivity to the particular institutional context and fiscal incentives, to insulate the polity from women’s financial needs.

*C. Administering Marriage in the Late Nineteenth  
and Early Twentieth Centuries*

Looking beyond the early nineteenth century, the pluralism that characterized American marriage law in the context of allocating liability for women’s dependency continued as a fundamental tension for many decades. Throughout the late nineteenth and early twentieth centuries, marriage-based entitlements became a commonplace feature of the various redistributive programs that formed the patchwork of American social welfare policy. Thus, even as marriage law continued to assign liability for married women’s support to husbands, thereby protecting the polity from women’s dependency, marriage increasingly served as a means for redistributing public assets in the form of marriage-based entitlements: Civil War widows’ pensions, workmen’s compensation for widows, and Social Security benefits for wives and widows. Although a full assessment of the treatment of marriage in the administration of such programs is beyond the scope of this Article, even a brief examination demonstrates that marriage-based entitlements have tended to generate the same question: What constitutes a marriage? And because common law marriage was recognized in many states until the early twentieth century, arguably unruly (and un-rule-like) judge-created definitions of marriage continued to complicate the administration of marriage-based entitlements.

Beginning in 1862, Congress enacted pension statutes for the benefit of traditional war widows of the Civil War.<sup>280</sup> And then, in

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280. See Act of July 14, 1862, ch. 166, § 2, 12 Stat. 566, 567 (granting pensions to widows of veterans who died after March 4, 1861, as a result of injuries or illness suffered “while in the service of the United States”). Notes in Pension Office ledgers reveal that, in fact, the Pension Office began awarding pensions to Civil War widows prior to congressional enactment of specific Civil War pension statutes. See *Regulations, Decisions, &c., Concerning the Payment of Pensions, with Forms, Provisions of Statute Law, &c., &c., Appertaining to the Business, Generally, of the Pension Branch of the Second Comptroller’s Office* (1862), NARA, Records of the Accounting Officers of the Dep’t of the Treasury, RG 217, Records of the Office of the Second Comptroller Army Pension Div., Entry No. 203, vol. 1, index (noting that pensions for the “Present War for suppression of the Rebellion . . . payment authorized out of the appropriations under 1st section of Act of July 4, 1836; July 21, 1848; 1st Sec. Act Feb. 3d, 1853; and Act of June 3d, 1853 (Decision of the Sec’y of Interior)”).

1890, following the pattern established by the creation of service-based pensions for the aging widows of veterans of the Revolutionary War and the War of 1812, Congress created service-based pensions for the surviving widows of Civil War veterans.<sup>281</sup> The legal construction of marriage in the administration of these statutes was a significant issue for legislators and administrators. As Elizabeth Regosin has shown, during the late nineteenth century, Congress worked to expand the reach of the Civil War pension system, especially to include recently emancipated African-American widows who had been unable to marry legally prior to emancipation.<sup>282</sup> By employing a broad definition of marriage and by pushing former slaves to ratify their familial relationships through formal processes, Congress, the Freedmen's Bureau, and the Pension Office helped to secure for all women the rights and benefits of citizenship, while also bringing them within the normatively appropriate bounds of a marital relationship.<sup>283</sup>

Certainly this is an important part of the story, but recent scholarship suggests that women's experience navigating the Civil War pension system was no more straightforward than that of their pre-Civil War forebears. Although it is true that the Pension Office, in conjunction with Freedmen's Bureau officials, sometimes recognized nonformalized coupling, as in the pre-Civil War period, administrators preferred record evidence, thus calling into question a generous understanding of marriage and of widows' claims on the polity. As Diana Williams has demonstrated, "When Freedmen's Bureau and Army Officials left [the South], they took with them both the administrative ledgers in which they had recorded ex-slave marriages [conducted by the Bureau], and the political will to regard such ledgers as documenting legal events."<sup>284</sup> Thus, "federal officials'

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281. Act of June 27, 1890, ch. 634, § 3, 26 Stat. 182, 182–83. In 1871, Congress created service-based pensions for the aging widows of War of 1812 veterans. Act of Feb. 14, 1871, ch. 50, 16 Stat. 411.

282. See REGOSIN, *supra* note 22, at 83–85 (discussing statutory amendments to the Civil War pension laws that allowed widows of "colored soldiers" who lived in states where slave marriages had been illegal to prove marriage by evidence of cohabitation as husband and wife); Franke, *supra* note 22, at 268 (same).

283. See REGOSIN, *supra* note 22, at 85 (noting that "white society sought to transform slaves into citizens by imposing the traditional marriage relationship"); Franke, *supra* note 22, at 289–90 ("The Freedmen's Bureau, working in tandem with local law enforcement authorities, undertook an aggressive campaign to force freed men and women to comply with the requirements of local marriage laws.")

284. Diana Williams, "Proof of the Due and Formal Celebration": What the Widows' Pension Claims of Women of Color Can Tell Us About Changing Legal and Social Norms of Marriage Following the Civil War (Oct. 5, 2007) (unpublished manuscript, on file with the Vanderbilt Law Review).

increasingly positivistic approach to marriage law marked an official end to their previous support of black women's civil identities and status entitlements as wives."<sup>285</sup>

World War I gave bloody birth to a new generation of war widows, and Congress once again provided widows' pensions.<sup>286</sup> By this time, opposition to common law marriage was fully organized and mobilized by marriage moralists and eugenicists who wanted the state to draw a clear line between marriage and non-marriage, between licit and illicit relationships.<sup>287</sup> Partially as a result of the success of the anti-common law marriage campaign, mandatory licensing and registration schemes were much more prevalent by the early twentieth century.<sup>288</sup> But administrators charged with the task of implementing the military pension system continued to struggle with and against informal marriage. In fact, informal marriage remained a significant enough socio-legal phenomenon in 1919 to warrant the Treasury Department's publication of the *Digest of the Law Relating to Common Law Marriage*, a volume that was necessary, according to its ghostwriter Otto Koegel, "for use in connection with hundreds of [military pension] claims founded on alleged common law marriages."<sup>289</sup>

Koegel, then a young lawyer in the Veterans' Bureau, became a vocal and prolific opponent of common law marriage, authoring several articles and an often-cited treatise explaining why common law marriage was equivalent to "living in adultery."<sup>290</sup> Koegel's strident opposition to common law marriage was undoubtedly informed by his experience at the Veterans' Bureau—which he once

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285. *Id.*

286. Act of Oct. 6, 1917, ch. 105, § 301, 40 Stat. 398, 405.

287. See GROSSBERG, *supra* note 10, at 77–78 (emphasizing marriage moralists' and social scientists' roles in the demise of common law marriage); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920*, 23 LAW & SOC. INQUIRY 541, 554–59 (1998) (discussing the formation and tenets of the marriage reform campaign).

288. See Bowman, *supra* note 110, at 731–54 (describing the movement to abolish common law marriage and the simultaneous increase in mandatory marriage licensing and registration schemes).

289. OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 8 (1922) (citing U.S. TREASURY DEP'T, BUREAU OF WAR RISK INS., DIGEST OF THE LAW RELATING TO COMMON LAW MARRIAGE IN THE STATES, TERRITORIES, AND DEPENDENCIES OF THE UNITED STATES (1919)).

290. Otto E. Koegel, *Common Law Marriage and Its Development in the United States*, in SECOND INT'L CONGRESS OF EUGENICS, EUGENICS IN RACE AND STATE 252, 252 (1921). Based on his experience in the Veteran's Bureau, Koegel was convinced that common law marriages were largely "meretricious relationships," and that "very few, if any, of these persons really believe they are married." *Id.* at 260. In 1922, he elaborated his analysis of common law marriage into a freestanding treatise. KOEGEL, *supra* note 289.

called "the largest court of domestic relations in the world"<sup>291</sup>—and was knit neatly with his eugenicist beliefs.<sup>292</sup> Eugenacists typically sought greater government control over marriage, particularly with respect to interracial marriage and marriage involving "imbeciles," and hence they generally opposed common law marriage.<sup>293</sup> For Koegel, the administrative complications caused by common law marriage in the context of administering marriage-based entitlements, and the ideological imperative that the state control marriage, led him to insist upon a singular, state-centered conception of marriage.<sup>294</sup>

The administrative and ideological resistance to informal marriage continued as the trappings of the modern welfare state emerged, including marriage-based entitlements for wives and widows in the workmen's compensation statutes of the 1910s and the Social Security Act of 1939.<sup>295</sup> Government officials (this time, lawyers for the Social Security Board) once again wrestled with how to manage the untidiness of marriage in the context of the administration of a modern system of social provision.<sup>296</sup>

Gradually, however, the disparity between judicial and administrative constructions of legal marriage began to disappear, and the bureaucratic, state-centered vision gained hold as the dominant understanding of marriage. Under pressure from different but complementary sources—agitation by marriage moralists and eugenicists who campaigned against common law marriage in the late

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291. Koegel, *supra* note 290, at 259.

292. Koegel was a member of the Central Committee on Hereditary Defects of the Second International Congress of Eugenics and, while still working in the Veterans' Bureau, published an article in the proceedings of the Second International Congress of Eugenics arguing that common law marriage should be abolished because it allows "defectives" to "simply declare themselves married." *Id.* at 261 (quoting an uncited committee report).

293. See Lindsay, *supra* note 287, at 571–80 (discussing eugenic marriage laws and citing examples from several states).

294. A *New York Times* reporter writing in 1920 proposed a very different solution to the question of "[w]hen is a widow not a widow?" At the end of story detailing the administrative difficulties military widows faced proving marital status, the *Times* reporter suggested that "What is needed is action by Congress modifying the existing law in some such way so as to grant recognition of widowhood in all cases where the widow and the old soldier have lived together as man and wife for a specified number of years." Rene Bache, *Widows of Our Wars*, N.Y. TIMES, Oct. 24, 1920, at 8.

295. See, e.g., Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360, 1364–65 (extending Social Security benefits to wives and widows); 1910 N.Y. Laws 1948–49, § 219-a; see also WITT, *supra* note 69, at 132–33 (discussing the history of workmen's compensation for widows of workers killed in work accidents); Kessler-Harris, *supra* note 17 (discussing the history of the Social Security Amendments of 1939).

296. See, e.g., Thomas Clifford Billig & James Phillip Lynch, *Common Law Marriage in Minnesota: A Problem in Social Security*, 22 MINN. L. REV. 177 (1938); James P. Lynch, *Social Security Encounters Common-Law Marriage in North Carolina*, 16 N.C. L. REV. 255 (1938).

nineteenth century, changing conceptions of femininity, and administration of an expanding range of public marriage-based entitlements—judges in the majority of states gradually abandoned the expansive vision of marriage that grounded the common law marriage doctrine.<sup>297</sup>

#### IV. CONCLUSION: SOCIAL PROVISION, ADMINISTRATIVE LAW, AND THE MODERN FAMILY

The story of early nineteenth-century widows' military subsidies provides a window into a world of women's lived experience of the law that, until now, has remained an unexplored aspect of American legal history. At the most basic level, widows' military subsidies tell a story about the development of marriage as a basis for women's public law claims on the polity for material support. That development ushered in a legal role for marriage as a source of broad-scale systematic public entitlements, opening up a new dimension in women's relationship with the polity. In the hands of early nineteenth-century administrators, this development in marriage's significance also shaped the legal contours of marriage itself, giving rise to a narrow, bureaucratic vision of marriage in an era that is known for the generous legal definition of marriage used by judges. Widows' military subsidy claims thus demonstrate marriage's plural and protean nature in the early nineteenth century and highlight the ways that different legal officials transformed the legal definition of marriage in response to ideological, institutional, and fiscal pressures and norms.

Although this legal history cannot resolve modern debates concerning the proper role of marriage in redistributive social policy, it does shed critical light on modern dilemmas concerning the relationship between social welfare policy and the legally recognized family. First and foremost, the experiences of women seeking early nineteenth-century military subsidies reveal that the use of marriage as a conduit for social provision is a longstanding and central feature of American social policy. It is a feature that continues today. Despite persistent criticism of government assistance for "unwed" mothers, the

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297. For fuller discussions of the various causes of the demise of common law marriage, see GROSSBERG, *supra* note 10, at 90–95 (emphasizing marriage moralists' and social scientists' role in the demise of common law marriage); Bowman, *supra* note 110, at 731–54 (discussing the roles of racism, the eugenics movement, and administration of large-scale benefits programs in the decline of common law marriage); Dubler, *Wifely Behavior*, *supra* note 10, at 996–1003 (discussing the relationship between changing conceptions of femininity and the demise of common law marriage).



federal government redistributes far more money to women by way of marriage-based entitlements such as Social Security than through need-based "welfare."<sup>298</sup> The emphasis on *women* as recipients of marriage-based entitlements is apt. Notwithstanding their formal gender neutrality, marriage-based entitlements in the United States remain gender salient: ninety-eight percent of all recipients of Social Security survivors' benefits are women, and over forty percent of all women who receive Social Security benefits receive them as wives rather than as workers.<sup>299</sup> Thus, while marriage is indeed a "mechanism through which we can avoid assuming collective (or state-assumed) responsibility for dependent members of our society,"<sup>300</sup> it is also a major conduit for government assistance for women as familial dependents.

Once we call attention to the legally recognized family's dual function in the context of public redistributive programs, we can begin to theorize the mutually constitutive relationship between welfare policy and family law with greater sensitivity to the protean and plural qualities of the legal family. Although marriage per se takes a fairly singular form today, the state continues to rely on the pluralism of the legally recognized family when confronted with women's financial needs. On the one hand, a host of scholars have demonstrated how, in the context of need-based social provision, legal officials tend to invoke broad conceptions of legally recognized family affiliations (both marital and non-marital) in order to protect the polity from women's claims to financial need. For example, efforts to locate women's dependency within the private family have precipitated "man in the house" rules,<sup>301</sup> the much-discussed marriage

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298. See sources cited *supra* note 15. One might quarrel with the implicit characterization of Social Security as a redistributive program, contending instead that Social Security benefits are an earned right or annuity. But even if one takes this position with respect to benefits paid to workers, Social Security benefits paid to spouses and children are difficult to characterize as anything other than redistributive, as they are paid to families of married workers without any additional contribution by the worker. To take the traditional scenario, married men do not pay greater Social Security contributions than unmarried men, but their wives are eligible to receive Social Security benefits additional to those paid to the husband. See COTT, *supra* note 25, at 177–78.

299. See sources cited *supra* note 13.

300. Martha A. Fineman, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 541–42 (1998). Of course, critics of the use of marriage as a substitute for social provision also recognize that "[m]arriage plays a significant role in the delivery of social goods from the state to individuals" in the form of "benefits and subsidies." MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 105, 106–07 (2004).

301. "Man in the house" rules, common in the 1950s and 1960s, allowed welfare officials to count the income of non-marital cohabitants as substitute husbands for the determination of

promotion policies that are now part of federal welfare law,<sup>302</sup> and broad legal recognition of marriage-like relationships in private law<sup>303</sup>—all in an effort to shift the burden of support onto a male “breadwinner.”

By contrast, in the course of allocating marriage-based entitlements, the state tends to gravitate toward a narrower, more legalistic definition of marriage—also, in part, to limit the polity’s liability for women’s support. For example, the Social Security Act crafts a narrow definition of “spouse” and imposes other eligibility restrictions so as to ensure that only certain “wives” and “widows” receive benefits. Thus, widows who were themselves wage earners, equal to or greater than their husbands, rather than stay-at-home caregivers, do not benefit from spousal entitlements and are in certain respects penalized for pursuing a nontraditional role.<sup>304</sup> For many

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welfare eligibility, or to drop women and children from welfare rolls altogether, if they discovered a “man in the house.” See William E. Forbath, *Lincoln, the Declaration, and the “Grisly, Undying Corpse of States’ Rights”: History, Memory, and Imagination in the Constitution of a Southern Liberal*, 92 GEO. L.J. 709, 764–67 (2004); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963). “Man in the house” rules were declared unconstitutional by the Supreme Court in 1968 and 1970. *Lewis v. Martin*, 397 U.S. 552, 559 (1970); *King v. Smith*, 392 U.S. 309, 321–27 (1968). But there is evidence to suggest that they, along with their generous conception of the legally cognizable familial obligations, are reemerging in local welfare laws and policies. See *Sanchez v. San Diego*, 464 F.3d 916, 919, 931 (2006) (upholding a California statute that explicitly allows home visits by welfare workers to confirm that “an ‘absent’ parent does not live in the residence”).

302. For example, the stated purposes of the Temporary Assistance to Needy Families program provide, in part, to “end the dependence of needy parents on government benefits by promoting . . . marriage; prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and encourage the formation and maintenance of two-parent families.” Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), 42 U.S.C. § 601(a) (2006).

303. In the context of private law disputes between unmarried couples, following the watershed case *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), over the last twenty years courts have broadened recognition of marriage-like relationships, imposing post-relationship support obligations on one member of the couple (usually the man in a heterosexual relationship) in favor of the member of the couple who had assumed a caregiver role at the expense of income-generating employment. Such broadening of legally recognized familial status acknowledges the financial reliance interests that frequently develop along with affective bonds, but as Grace Blumberg has observed, it also helps to limit public liability for family dependents. See Blumberg, *supra* note 6, at 1270.

304. See Meyer, *supra* note 33, at 462 (“Indeed, the stratifying effects of noncontributory benefits undermine the otherwise redistributive characteristics of the Social Security system. . . . They are most beneficial to women who never work and who maintain lengthy marriages.”); see also Marilyn R. Flowers, *Supplemental Benefits for Spouses Under Social Security: A Public Choice Explanation of the Law*, 17 ECON. INQUIRY 125, 125 (1979) (“Individuals who qualify both for retired worker benefits and for supplementary spouse benefits are in the position of receiving total retirement benefits under the program which are no greater than would have been granted had they never been employed and paid social security taxes.”); Karen C. Holden, *Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and*

years, divorced women were not eligible for any form of spousal benefit under the Social Security Act, regardless of how long they were married and regardless of what led to the divorce.<sup>305</sup> Today, some women who are divorced from their husbands are provided for, but only if they remain unmarried following divorce and the marriage lasted at least ten years, a provision that is strictly enforced *to the day* by the Social Security Administration.<sup>306</sup> In this way, the state limits its responsibility to provide for women's dependency through marriage by allocating spousal benefits to those wives who assume a relatively traditional homemaker role and remain in that traditional marital relationship.

An even more dramatic example of how the state uses marriage to limit the allocation of marriage-based entitlements is evident in the ongoing battles over the exclusion of same-sex couples from marriage generally and, specifically, from access to social provision that is distributed on the basis of marriage. Gay activists' charges that heterosexual-only marriage effectively excludes same-sex couples from a whole host of public entitlements were starkly reinforced and confirmed by the enactment of the Defense of Marriage Act in 1996. That federal statute mandates that the term "marriage"—as it appears in all federal statutes or "any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States"—refers to heterosexual couples only, thereby ensuring that federal marriage-based entitlements such as Social Security are not allocated to a same-sex spouse.<sup>307</sup>

Of course, resistance to marriage or marriage-like relationships for same-sex couples is not primarily driven by a desire to minimize the state's fiscal obligations to the families of same-sex couples.<sup>308</sup> Clearly, various ideological objections to homosexuality itself are the

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*Child-Care Drop-Out Years*, in A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY 41, 51, 58–59 (Richard V. Burkhauser & Karen C. Holden eds., 1982) (stating that "one- and two-earner couples with identical combined retired-worker benefits are treated differently, with the former more likely to receive a supplemental spouse benefit"); Madonna Harrington Meyer, *Family Status and Poverty Among Older Women: The Gendered Distribution of Retirement Income in the United States*, 37 SOC. PROBS. 551, 553–59 (1990) (finding that under the U.S. Social Security system "couples are rewarded for maintaining a traditional family structure").

305. Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 257 (1980) ("The 1939 amendments did not include any provision for divorced wives.").

306. See 42 U.S.C. § 416(d) (2006); *George v. Sullivan*, 909 F.2d 857, 861–62 (6th Cir. 1990) (denying Social Security benefits to an ex-wife because the duration of the marriage was six days short of the ten-year requirement).

307. 1 U.S.C. § 7 (2006).

308. See Cossman, *supra* note 6, at 482–83.

source of the continuing exclusion of same-sex couples from marriage in most U.S. jurisdictions, and such objections similarly animate the exclusion of same-sex couples from the bounty of federal and state marriage-based entitlements.<sup>309</sup> Nevertheless, the exclusion of same-sex couples from marriage and marriage-based entitlements is a particularly charged example of how such entitlements have become part and parcel of the social meaning of marriage itself, and how the government limits the legal definition of marriage to control access to those entitlements. Thus, just as we should be attuned to the ways that a broad conception of the legally recognized family is employed in an effort to attach women to a male breadwinner, thereby limiting the state's fiscal responsibility for certain women's dependency, we should also be attentive to the ways that the state has reinforced marriage's exclusionary characteristics when allocating marriage-based entitlements.

Now, one might reason that by using marriage as a basis for entitlements, the state has simply selected a preexisting status—marriage—as a conduit for redistribution. But one benefit of taking a long, historically informed view of the relationship between marriage and welfare policy is that we can see how the legal contours of the family are responsive to multiple fiscal, institutional, and ideological pressures. In the context of both need-based welfare and marriage-based entitlements, the relationship between the legal institution of marriage and social provision is dynamic. The state has not simply employed a preexisting notion of the legal “family” or “marriage” as a basis for allocating marriage-based entitlements or for limiting need-based welfare. Instead, acting through all manner of officials, the state has shaped the metes and bounds of marriage and the family at least in part in response to the pressure created by different legal liability rules and systems of social provision. And it has done so while preserving and sustaining the image of marriage's transhistorical and enduring stability.

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309. For recent evidence of the mounting efforts to exclude same-sex couples from public and private entitlements frequently associated with marriage, see *National Pride at Work v. Michigan*, 481 Mich. 56, 86–87 (2008) (finding that Michigan's constitutional ban on same-sex marriage also prohibits public employers from providing health insurance benefits to the same-sex domestic partners of covered employees).

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